No. 88-1165

Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

COUNTY OF SONOMA,
Petitioner,

VS.

JOHN S. HERRINGTON,
DAVID S. HERRINGTON,
QUAIL HILL RANCH, a Partnership,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTONIO COSBY-ROSSMANN
380 Hayes Street
San Francisco, CA 94102
(415) 861-1401
Counsel of Record

JAMES P. BOTZ
County Counsel
STEPHEN K. BUTLER
Assistant County Counsel
County of Sonoma
575 Administration Drive
Santa Rosa, CA 95401
(707) 527-2421
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

Whether, in derogation of *City of St. Louis v. Praprotnik*, multi-million dollar section 1983 liability against a county government can be predicated on inconsistent treatment and modification of documents by junior planning staff members, where they have no authority for those actions or for final determination of land-use permits.

Whether in a section 1983 municipal liability action, in which the defendant county moved for a summarily-denied directed verdict at the close of plaintiffs' case, and for judgment n.o.v. on issues of law, but failed to renew the directed verdict motion at the close of its own case, the county will be denied regular appellate review because the Ninth Circuit refuses to follow the other Circuits' liberal application of Rule 50(b).

Whether section 1983 plaintiffs who fail to establish the permitted level of land-use development, and whose record the Ninth Circuit concedes will leave the trial court "at sea," can present a claim sufficiently ripe to enable a rational calculation of damages.

Whether a federal district court judge, in a case brought by landowners complaining of a county's land-use regulation, who fails to disclose that he himself had disputed the county's similar land-use regulations, should be permitted to preside at the trial against the county.

TABLE OF CONTENTS

	Page
Questions Presented	i
Prayer for Relief	1
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Petition	8
I	
By Failing to Apply *City of St. Louis v. Praprotnik*, the Ninth Circuit Erroneously Rendered the County Liable for Its Junior Planners' Unauthorized Inconsistent Treatment and Modification of Documents	8
II	
The Ninth Circuit Erroneously Maintained the County's Liability by a Narrow Application of Rule 50(b) That Expressly Refuses to Follow the Liberal Construction of the Other Circuits	12
III	
By the Ninth Circuit's Own Admission, Its Failure to Require That Landowners Present a Ripe Claim Will Render It Impossible to Fix Damages in This and Other Section 1983 Land Use Cases	15
IV	
Disqualification of a District Court Judge Who Presided at the Land-Use Trial of the Same County With Which He Had a Land-Use Dispute Is Necessary to Maintain Public Confidence in the Judiciary	18
Conclusion	22

TABLE OF AUTHORITIES

Cases

Page

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) 21
American Protein Corp. v. AB Volvo & Volvo Lastvagnar AB, 844 F2d 56 (2d Cir.), *cert denied,* 109 S.Ct. 136 (1988) 14
Beaumont v. Morgan, 427 F.2d 667 (1st Cir.), *cert. denied,* 400 U.S. 882 (1970) 14
Bohrer v. Hanes Corp., 715 F.2d 213 (5th Cir. 1983) 14
Cabrales v. County of Los Angeles, 88 L.A.Daily.J.D.A.R. 16056 (9th Cir. Dec. 28, 1988) 13
City of Little Rock v. Williams, 108 S.Ct. 1102 (1988) ...1, 11
City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 10, 15
City of St. Louis v. Praprotnik, 108 S.Ct. 915 (1988) 1, 7, 8, 9-11, 12, 13
Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968) 21
Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982) 9
Ebker v. Tan Jay International, Ltd., 739 F.2d 812 (2nd Cir. 1984) 14
Farley Transportation Co., Inc. v. Sante Fe Transportation Co., 786 F.2d 1342 (9th Cir. 1986) 12, 13
First English Evangelical Lutheran Church v. County of Los Angeles, 107 S.Ct. 2378 (1987) 17, 18
Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982), *cert. denied,* 459 U.S. 1205 (1983) 14
In Re Murchison, 349 U.S. 133 (1955) 21
Johnson v. Armored Transport of California, Inc., 813 F.2d 1041 (9th Cir. 1987) 13
Kladis v. Brezek, 823 F.2d 1014 (7th Cir. 1987) 14
Lifshitz v. Walter Drake & Sons, Inc., 806 F.2d 1426 (9th Cir. 1986) 13
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 16-17, 18

TABLE OF AUTHORITIES

CASES

Page

McKinnon v. City of Berwyn, 750 F.2d 1383 (7th Cir. 1984) 13-14
Miller v. Rowan Companies, Inc., 815 F.2d 1021 (5th Cir. 1987) 14
Mosley v. Cia. Mar. Adra S.A., 362 F.2d 118 (2nd Cir.), *cert. denied*, 385 U.S. 933(1966) 14-15
Norco Construction, Inc. v. King County, 801 F.2d 1143 (9th Cir. 1986) 16
Northwest Indian Cemetery Protective Assn. v. Peterson, 565 F.Supp. 586 (N.D. Cal. 1983), *affirmed in part and vacated in part*, 764 F.2d 581 (9th Cir. 1985), *affirmed on rehearing*, 795 F.2d 688 (9th Cir. 1986), *reversed sub. nom.* Lyng v. Northwest Indian Cemetery Protective Assn., 108 S.Ct. 1319 (1988) 22
Sector Refining, Inc. v. Enterprise Refining Co., 771 F.2d 496 (Temp.Emer.App. 1985) 14
Tumey v. Ohio, 273 U.S. 510 (1927) 21
Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir.), *cert. denied sub nom.* Alter v. Schroeder 109 S.Ct. 226 (1988) 15
Ward v. Village of Monroeville, 409 U.S. 57 (1972)..... 21
Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 16, 18

Constitution

United States Constitution, amendment 14, section 1 3

TABLE OF AUTHORITIES

Statutes and Rules

Page

28 U.S.C.:
Section 144 ..... 3, 21
Section 455(a) 3, 21
Section 455(b)(1) 3, 21
Section 1154(1) 2
42 U.S.C. Section 1983 ..... *passim*
Federal Rules of Civil Procedure:
Rule 1 13
Rule 50(b) 2, 4, 12, 13, 14, 15
Rule 51 15

Miscellaneous

Editorial, Santa Rosa Press-Democrat, January 2, 1986 .. 21
The Supreme Court—Leading Cases, 102 Harv.L.Rev. 143 (1988) 11

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

COUNTY OF SONOMA,
Petitioner,

VS.

JOHN S. HERRINGTON,
DAVID S. HERRINGTON,
QUAIL HILL RANCH, a Partnership,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PRAYER FOR RELIEF

Petitioner County of Sonoma seeks certiorari to review and reverse the judgment of the Ninth Circuit Court of Appeals, which vacated a $2,500,600 section 1983 judgment against the County, but left intact, on the basis of evidence even the Circuit found "skeptical," a jury finding of liability. Because the Ninth Circuit's decision directly conflicts with *City of St. Louis v. Praprotnik,* 108 S.Ct. 915 (1988) on two distinct grounds (basis of liability and reviewability), and the Ninth Circuit ignored the County's petition to apply *Praprotnik* to this case, relief could be granted by granting certiorari, vacating judgment, and requiring reconsideration in light of *Praprotnik. City of Little Rock v. Williams,* 108 S.Ct. 1102 (1988).

This case, however, affords the Court opportunity to declare a presently-lacking majority ruling on the scope of section 1983 municipal liability for employee actions. Moreover, this case enables the Court to cure the present conflicting application of Rule 50(b) by the Circuits. Finally, this proceeding allows the Court to articulate the need for ripeness to calculate damages in section 1983 land-use cases. The County therefore seeks the granting of certiorari and setting the case for plenary argument.

If granted on those grounds, certiorari will also enable the Court to address the disqualification in such cases of district court judges who themselves dispute the land-use regulation of defendants in their courts.

OPINIONS BELOW

The decisions of the District Court, rejecting the County's motion for judgment n.o.v. and entering judgment for respondents, are unreported. App. A, B, C.R. 222, 223; *see* C.R. 229. The initial decision of the Ninth Circuit, as filed on December 24, 1987 and amended February 10, 1988, is reported at 834 F.2d 1488. App. C. That decision affirmed a jury finding of liability, vacated the jury's award of $2,500,600 as excessive, and directed a new trial on damages. The September 13, 1988 decision of the Ninth Circuit, further amending the opinion and denying rehearing and rehearing en banc, is reported at 857 F.2d 567. App. D. That decision rewrote the "ripeness" discussion of the initial opinion, but otherwise left the initial opinion and result unchanged.

JURISDICTION

Petitioner County of Sonoma invokes this Court's jurisdiction by certiorari pursuant to section 1154, paragraph (1), title 28, United States Code. The Ninth Circuit finally disposed of the County's appeal by its denial of rehearing and rehearing en banc on September 13, 1988. On November 22, 1988, Justice O'Connor extended until January 11, 1989 the time in which to file the present petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendment 14, section 1:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, title 42, section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

United States Code, title 28, section 144:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

United States Code, title 28, section 455(a):

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

United States Code, title 28, section 455(b)(1):

> He shall also disqualify himself in the following circumstances:
>
> > Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

Federal Rules of Civil Procedure, Rule 50(b):

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. . . .

STATEMENT OF THE CASE

Respondents brought suit in 1980 in the Northern District of California under section 1983 of title 42, United States Code. Respondents attacked the County's preliminary determination that its general plan would not permit a 32-unit subdivision of respondents' property in an agricultural and timber reserve, Tr.Ex. 38, and the County's subsequent approval of a specific plan and rezoning for the area in which the property is located. Tr.Ex. 48.

A 10-day trial was conducted before the Honorable Stanley A. Weigel in late 1985. At the close of respondents' case, the County's trial counsel moved for a directed verdict, which the Court confined to five minutes of oral argument and then summarily denied. R.T. 7-3 to 7-7. At the close of all the evidence, respondents abandoned their major claim: that their property had been "taken" in violation of the Fifth Amendment. R.T. 10-75 to 10-100. Recognizing the hostility of appellate courts to such claims, respondents recast their case as one in substantive due process, procedural due process, and equal protection. R.T. 10-97. The County's trial counsel did not renew his motion for directed verdict. The case went to the jury on instructions largely drafted by respondents (because the County's instructions intended to meet the "takings" claim), to which the County at the trial judge's insistence agreed. R.T. 1-13, 10-72, 10-78, 10-168, 12-24.

The facts developed at trial, which in this petition the County accepts as true, are fairly described in the Ninth Circuit's first

decision, App. C at A-9 to A-13, 834 F.2d at 1490-1492. In one respect the appellate tribunal erred; it is not true that the public was excluded from the March 4, 1980 supervisors' meeting. The public (including respondents) were present, and respondents presented their written objections to the board. R.T. 2-157, Tr. Ex. 46.[1] In another respect, the Ninth Circuit's factual account is incomplete; it does not recite the actions respondents did not take. Respondents never submitted any development proposal to the County other than the 32-unit subdivision. R.T. 3-107 to 3-108. They never sought determination of how many units would be acceptable. R.T. 2-206 to 2-207. They did not redesign their project into one recreationally oriented, as suggested by staff. R.T. 8-63. They did not seek a general plan amendment to accommodate their proposal and justify their requested density. R.T. 8-64, 2-197. And respondents did not return to the supervisors, after the board's approval of the other four subdivisions that respondents thought similar to their own, to seek reconsideration of their proposal in light of those approvals. R.T. 5-40 to 5-44.

The property at issue was given to respondents by their parents, subject only to a $60,000 note. R.T. 2-185. Although the property was valued by respondents at trial at $1,300,000, R.T. 6-137, and in closing argument respondents' counsel asked for a verdict in the neighborhood of $1,500,000 to $1,700,000, R.T. 11-132, the jury awarded damages in the amount prayed for at the opening of the damages phase, $2,500,600. R.T. 7-10, C.R. 136.

Unknown to the County until the last day of trial, and then not by the judge's own admission, Judge Weigel had owned two large pieces of property in Sonoma County that had been substantially downzoned by the same general plan revisions that respondents experienced. Judge Weigel had sought the assistance of counsel and other professionals in real estate in his ultimately unsuccessful attempt to avoid the County's downzoning of his property.

When the County's attorneys discovered the facts regarding Judge Weigel's previous experience with the County on his own properties, they immediately investigated the facts, and finding

---

[1] The County sought correction of this error by its petition for rehearing. See p. 8, n. 3, *post*.

them of substantial concern, sought an order for his recusal. C.R. 140-144, 148-150. Judge Weigel denied this motion and refused to order a new trial, but ultimately removed himself from the case, C.R. 161, after engaging in an extraordinary attempt to browbeat the former Assistant County Counsel in an intemperate expression of his outrage. C.R. 163 at 72-92.

Judge Clark A. Legge was assigned to the remaining matters in this case. C.R. 175. The County moved for judgment n.o.v. as a matter of law, construing the facts asserted by respondents on the merits as true; the County's motion included a request to vacate all proceedings over which Judge Weigel presided. C.R. 199. Judge Legge considered, and denied on the merits, the County's motion for judgment n.o.v. and new trial. Apps. A, B; C.R. 222, 223; *see* C.R. 229. The County's timely appeal to the Ninth Circuit followed. C.R. 224.[2]

The Ninth Circuit issued three divided opinions in this case. In its first decision, two Circuit Judges ruled that respondents' case was ripe for review, excusing respondents from establishing the level of permitted development because their claim was not a "taking" one. Concluding that by the County's failure to renew its directed verdict motion at the close of trial and by acquiescence in jury instructions, the County had waived all appellate review except that for "plain error," the Court of Appeals majority found there not to be "an absolute absence of evidence" in respondents' favor, even though the majority was "skeptical" of elements of respondents' case. Thus, the majority affirmed liability for denial of due process and equal protection. The majority expressly declined to rule on the County's claim that County liability could not attach to the unauthorized actions of subordinate planning staff. The majority also ruled that the County failed to demonstrate that Judge Weigel should have disqualified himself prior to trial.

---

[2] Subsequently Judge Legge awarded respondents their full claim for attorney's fees of $406,000. That award is the subject of the County's pending appeal before the Ninth Circuit, *Herrington v. County of Sonoma*, No. 87-1860.

On the issue of damages, however, the Ninth Circuit majority found plain error in a verdict "so grossly excessive that it shocks the conscience." Finding the award speculative, cumulative, and inconsistent with respondents' retention of the land, the majority vacated the award and ordered a retrial on damages. The majority expressly did not define the theory on which damages should be determined.

One Circuit Judge dissented, holding that the case was not ripe, because respondents' failure to prove the level of permitted development would inherently render any damages award speculative. The dissenter agreed in any event that the jury award was excessive and retrial of that issue warranted.

The County timely petitioned for rehearing, ultimately joined by the respondents who sought attorneys fees on appeal. The County claimed that the majority's ripeness holding was at odds with this Court's rulings and that of every other Ninth Circuit section 1983 land-use case, and that the absence of proof on the permitted level of development would render damages inherently speculative.

In its first response, the majority on February 10, 1988 amended its opinion to add footnote 23, dealing with possible damages theories. That footnote included the candid observation that "the trial court may well be at sea in its attempt to fix damages." This amended opinion did not dispose of the petitions for rehearing.

While those petitions were pending, this Court decided *City of St. Louis v. Praprotnik,* 108 S.Ct. 915 (1988). The County immediately requested the Ninth Circuit to consider that case and reverse the liability judgment on the basis of the *Praprotnik* holding.

On September 13, 1988 the Ninth Circuit issued its third decision. The two-judge majority completely rewrote its "ripeness" section, holding that respondents had received a final determination of their application for consistency determination. But the panel again did not require respondents to prove the level of development permitted. Nor did the panel address at all the County's argument that *Praprotnik* required reversal of liability.

The majority authorized the respondents to seek fees on appeal, and denied rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

I

BY FAILING TO APPLY *CITY OF ST. LOUIS V. PRAPROTNIK*, THE NINTH CIRCUIT ERRONEOUSLY RENDERED THE COUNTY LIABLE FOR ITS JUNIOR PLANNERS' UNAUTHORIZED INCONSISTENT TREATMENT AND MODIFICATION OF DOCUMENTS

In this section 1983 action, the respondents' case against the County was built upon their complaints that two county planners had treated them inconsistently and rudely, encouraged delay, and in effect denied them a ruling without examining their papers, R.T. 3-28, *et. seq.;* and that another county planner had removed four brief paragraphs from respondents' five-page written description of their project, before submitting that description to a county agricultural advisory committee. R.T. 3-51, *et seq.* See Appellees' Reply Brief 7, 11-12; R.T. 11-58 *et. seq.* (closing argument).

These complained-of actions, which the County accepts as proven facts for the purpose of this petition,[3] may seem trivial. Indeed, the alteration *is* trivial, as will be seen by comparing the

---

[3] Respondents also complained of being denied an opportunity to speak at one advisory committee meeting and one supervisors' meeting. Appellees' Reply Brief, 26. The County accepts these assertions as true. The Court of Appeals erroneously describes that latter meeting as one from which the public was *excluded*. App. C at A-13, 834 F.2d at 1492; see Appellant's Petition for Rehearing 13. The undisputed facts show that prior to the supervisors' action of which respondents complained, they had knowledge of the proposed action, R.T. 2-171, and actually participated in hearings on it, *id.*, R.T. 2-156, 2-157, 2-164, 2-167, 3-142, and submitted written objections directly to the supervisors. Tr. Ex. 46. The supervisors' public meeting at which no member of the public *spoke* (but which respondents attended, R.T. 2-157) came after close of the public hearings and submission of the matter to the supervisors. Brief of Appellant 26. These uncontested facts do not produce a denial

respondents' project description with that as presented by the staff planner. Compare Tr.Exs. 9, 35. But on such dramatically-presented facts did a jury award $2,500,600 damages to the respondents. The jury's determination did not recognize that (1) the one planner's alteration was insignificant; (2) the alteration only affected an advisory committee with no decision-making authority; (3) respondents were able to correct this record before the board of supervisors, and secure planning commission review of another planner's ruling and reverse it; (4) none of planners' actions effectuated a board of supervisors' policy of inconsistency, rudeness, delay or document alteration. R.T. 3-48, 3-72, 6-91, 8-96, 8-100.

Nor did the Court of Appeals pass on these determinations as a matter of law, even though the County moved on these grounds for directed verdict at the close of respondents' case, R.T. 7-3 *et seq.* (which was summarily rejected, R.T. 7-7), moved for judgment n.o.v. at the close of trial, C.R. 199, and raised these questions on appeal. Brief of Appellant 29, *et seq.*

The Ninth Circuit responded as follows to the County's claim that it is not liable for the junior planners' actions:

> However, the County did not request a jury instruction distinguishing the acts of County staff from County officials. The jury found the County to be responsible for the misdeeds in question. We cannot conclude that the Herringtons' evidence provided no support to a verdict of procedural due process violations.

App. C at A-29 to A-30, 834 F.2d at 1501.

This response directly conflicts with this Court's subsequent holding in *City of St. Louis v. Praprotnik,* 108 S.Ct. 915. Seven Justices of this Court in *Praprotnik* have recognized that not every improper act of every municipal employee can be translated into a Federal Constitutional cause of action against the municipality itself under section 1983. First, the Court held that it would review the merits of the city's section 1983 defense, even though

---

of due process. *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822, 833 (1st Cir.), *cert. denied,* 459 U.S. 989 (1982).

the city *itself* offered the erroneous jury instruction on which liability was found. The Court emphasized that appellate review was deserved because the city had asserted legal error below, and necessary because the subject of section 1983 municipal liability presented a landscape of evolving contours, one "manifestly need[ing] clarification." 108 S.Ct. at 922. *Accord, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-257 (1981) (despite failure to object to jury instructions, City's defense reviewed on the merits because of "evolving contours" of section 1983 municipal liability).

Turning to the merits, a four-Justice plurality of the Court, joined by three other Justices in the result, held that liability could not be predicated on the actions of officials who lacked authority under state law to set a final, unconstitutional policy. 108 S.Ct. at 924-927. (The concurring Justices preferred to establish a generic, nationwide rule to measure the municipality's vicarious liability. *Id.* at 934-936.) In particular, the Court held it erroneous to predicate liability against the city on the actions of a hiring-and-firing officer, when that officer lacked authority to establish a municipal policy of retaliatory firings.

Praprotnik was decided on March 2, 1988. On March 11, 1988, the County supplemented its petition for rehearing then pending before the Ninth Circuit, to argue that the "Court's decision last week in *Praprotnik* shows that the County's defense should be reviewed for its substance, and sustained." Supplement to Petition for Rehearing 3. Although the Ninth Circuit significantly modified the "ripeness" position of its decision in an amended opinion issued six months later, the appellate tribunal did not even address, let alone follow, the *Praprotnik* decision.

The present case calls for relief under *Praprotnik*—as enunciated either by the four-Justice plurality or the more stringent concurrence of Justices Brennan, Marshall and Blackmun. All seven Justices agreed that section 1983 liability could not be predicated on a hiring-and-firing officer's action because he did not establish final employment authority, nor did he enjoy delegated power to discharge for retaliation. 108 S.Ct. at 933 (concurring opinion). In the present case, an even stronger defense to section 1983 liability applies: none of the planners whose actions

respondents complain of held *any* final decision-making authority over respondents' application. Nor were they delegated authority by the board of supervisors, who alone fixed the County's final land-use policy, to act inconsistently toward applicants or to alter the applicants' presentations.

Moreover, in *Praprotnik,* the Court exonerated the city from having *proposed* an erroneous instruction. In the present case the Ninth Circuit condemned the County to unwarranted liability merely because "[i]t *agreed* without reservation to the submission of the issues to the jury." App. C at A-26, 834 F.2d at 1499 (emphasis added).

Because the Ninth Circuit failed to address these issues so clearly briefed to it, a proper response to the present petition would grant certiorari, vacate judgment, and direct reconsideration in light of *Praprotnik.* The Court followed that course in *City of Little Rock v. Williams,* 108 S.Ct. 1102 (1988).

The Court is nonetheless invited to grant the petition, to address the remaining questions presented in this petition, and also to establish more definitive guidance on section 1983 municipal liability than does the present 4-3 decision in *Praprotnik.* There is need for such guidance. "The divided opinion in *Praprotnik* marks the continuing inability of the Court to complete its self-appointed task of defining a set of municipal employees whose isolated acts may lead to municipal liability." *The Supreme Court—Leading Cases,* 102 Harv.L.Rev. 143, 326 (1988). The present case affords the full Court the opportunity to determine whether "policymakers" should be defined by state law alone (plurality opinion of Justice O'Connor), by a more generic uniform standard identifying those with ability to promulgate criteria binding in future cases (concurring opinion of Justice Brennan), or by yet some other standard; and the role, if any, that a jury should play in establishing liability. See 102 Harv.L.Rev. at 327.

In the present case we assert that, as in *Praprotnik,* by any standard the jury should not have been allowed to establish liability against the County for the inconsistencies, delays, rudeness, or document-alteration of junior staff planners. The

$2,500,600 verdict against the County that resulted from a jury's assessment of such conduct evidences the need to confine the jury's role in section 1983 land-use cases.

II

THE NINTH CIRCUIT ERRONEOUSLY MAINTAINED THE COUNTY'S LIABILITY BY A NARROW APPLICATION OF RULE 50(B) THAT EXPRESSLY REFUSES TO FOLLOW THE LIBERAL CONSTRUCTION OF THE OTHER CIRCUITS

While the reasoning and result of *Praprotnik* justify correction of the Ninth Circuit's decision in this proceeding, there is one distinction between the two cases. In the present case, after summary rejection of his motion for directed verdict at the close of the respondents' case, R.T. 7-7, the County's trial counsel did not move for directed verdict at the close of his own case.[4]

The Ninth Circuit regarded this forensic *faux pas* as determinative of the County's section 1983 liability. Relying on *Farley Transportation Co., Inc. v. Santa Fe Transportation Co.*, 786 F.2d 1342, 1346 (9th Cir. 1986), two judges on the panel "decline[d] to depart from [the Circuit's] strict interpretation" that absolutely forecloses judgment n.o.v. in the absence of a reserved or renewed motion for directed verdict at the close of defendant's case. App. C at A-28, 834 F.2d at 1500. From that premise, the Ninth Circuit declined to review the merits except for plain error, sustaining liability on not finding "an absolute absence of evidence" against the County; and notwithstanding the panel's view that it was "skeptical" of the remainder of respondents' case. App. C at A-30, 834 F.2d at 1501.

Rule 50(b) of the Federal Rules of Civil Procedure does not specify that as a condition of appellate review, a motion for directed verdict must be made at the close of defendants' case;

---

[4] The futility of a renewed motion by trial counsel must be considered not only in the context of the summary disposition of his first motion, but also in the context of the District Court's evident bias against Sonoma County. See part IV, *infra*.

the rule authorizes judgment n.o.v. so long as the moving party also moved for a directed verdict at some point in the trial. The requirement for a directed verdict motion at the end of trial has been fleshed out in Advisory Committee notes and case law. In the Circuits' treatment of the need for a renewed motion, the Ninth Circuit stands in isolation at the most inflexible end of the spectrum. *See Cabrales v. County of Los Angeles,* 88 L.A.Daily.J.D.A.R. 16056, 16058 (9th Cir. Dec. 28, 1988) (following the present case); *Johnson v. Armored Transport of California, Inc.,* 813 F.2d 1041, 1042-1043 (9th Cir. 1987); *Lifshitz v. Walter Drake & Sons, Inc.,* 806 F.2d 1426, 1428 (9th Cir. 1986). Of all the Ninth Circuit cases, the present one stands as probably the most extreme specimen.

Grounding its present decision in *Farley*, the Ninth Circuit eschewed the liberal application of Rule 50(b) followed in the other circuits. *Farley* expressly rejected *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1389-90 (7th Cir. 1984) (Posner, J.), which would allow judgment n.o.v. (and regular appellate review) in a section 1983 action when the directed verdict was sought at close of plaintiff's case and no prejudice flowed to plaintiff by nonrenewal of the motion at the close of defendant's case. *Farley*, 786 F.2d at 1346 n. 2.

(In the present case the District Court followed the Seventh Circuit reasoning, and finding no prejudice to respondents' evidentiary presentation, considered the motion for judgment n.o.v. on the merits. C.R. 229 at 48. Had the District Court been able to foresee this Court's holding in *Praprotnik*, the motion likely would have been granted and the County absolved of section 1983 liability in that tribunal. Conversely, the Ninth Circuit's hard line on Rule 50(b) probably explains its failure to consider *Praprotnik* in this appeal.)

Judge Posner's reasoning for the Seventh Circuit deserves consideration and adoption by this Court to ensure nationwide that Rule 50(b) "shall be construed to serve the just, speedy, and inexpensive determination of every action." F.R.Civ.Proc., R.1.

> But bearing in mind that Rule 50(b) is not clearly drafted (one might have thought that after 46 years something would have been done about this), that the requirement of renewing the motion for directed verdict at the close of all the evidence is not intuitive, and that many parties sued in or removed to federal court are not represented by experienced federal practitioners, it would be excessively strict to confine the policy of leniency to cases where the judge happens to have reserved action on the motion for a directed verdict when it was made (and never renewed).

McKinnon, supra, 750 F.2d at 1390.

In a subsequent section 1983 decision, the Seventh Circuit affirmed that the need for a directed verdict motion at the close of defendant's evidence arises only to avoid compromising the right to a jury trial of factual issues; but that the motion should not be required when the party's dispute concerns a matter of law which is outside the province of the jury. *Kladis v. Brezek*, 823 F.2d 1014, 1017 (7th Cir. 1987).

Other Circuits—most notably, the Second and Fifth—agree that Rule 50(b) should not foreclose regular appellate review when failure to renew the directed-verdict motion works no prejudice to the plaintiff at trial. *American Protein Corp. v. AB Volvo & Volvo Lastvagnar AB*, 844 F.2d 56, 61-62 (2d Cir.), *cert. denied*, 109 S.Ct. 136 (1988); *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812, 823-24 (2nd Cir. 1984); *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021, 1024-1025 (5th Cir. 1987); *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216-217 (5th Cir. 1983); *accord, Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Beaumont v. Morgan*, 427 F.2d 667, 670 (1st Cir.), *cert. denied*, 400 U.S. 882 (1970); see *Sector Refining, Inc. v. Enterprise Refining Co.*, 771 F.2d 496, 503-505 (Temp.Emer.App. 1985) (motion necessary if factual disputes invoked). In its inflexibility, the Ninth Circuit stands alone.

More than two decades ago the Second Circuit ruled that "[t]he requirement of Rule 50(b) . . . that a directed verdict motion must precede an n.o.v. motion is harsh in any circum-

stances," and the rule should not become a forensic trap to penalize clients whose trial counsel fail to carry out a meaningless act. *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118, 121-122 (2nd Cir.), *cert. denied*, 385 U.S. 933 (1966). In the present proceeding the Ninth Circuit perpetuates an inflexible and unjust application of the rule that celebrates style over substance. Certiorari affords this Court an opportunity to effectuate pragmatic, realistic and uniform application of Rule 50(b), according it the same liberality now required with respect to jury-instruction objections under Rule 51. *See City of Newport v. Fact Concerts, Inc., supra*, 453 U.S. at 255-257. Certiorari will relieve the County of liability that can only be predicated on its trial counsel's false step in a procedural minuet.

III

BY THE NINTH CIRCUIT'S OWN ADMISSION, ITS FAILURE TO REQUIRE THAT LANDOWNERS PRESENT A RIPE CLAIM WILL RENDER IT IMPOSSIBLE TO FIX DAMAGES IN THIS AND OTHER SECTION 1983 LAND USE CASES

The two-judge majority that decided this case in the Ninth Circuit has admittedly had difficulty in addressing "finality" and its relationship to the assessment of damages. Twice the majority found it necessary to amend its opinion in response to the County's petitions; the second amendment resulted in a complete rewrite of the "ripeness" discussion but with no change in the result. App. D, 857 F.2d 567. In rewriting its decision, the majority eliminated the *only* point—its correct observation that ripeness "rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable," App. C at A-16, 834 F.2d at 1494—for which this case has been relied upon by another court. *See Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir.), *cert. denied sub. nom. Alter v. Schroeder*, 109 S.Ct. 226 (1988). But with commendable candor, the majority left intact its observation that "the trial court may well be at sea in its attempt to fix damages." App. C at A-41, n. 23, 834 F.2d at 1506, n. 23.

Dissenting Circuit Judge Tang explained why this case remains unripe, and damages incapable of calculation, until the landowner establishes the level of development permitted and the grounds for that permission:

> The difficulty with treating [respondents' claims of arbitrary and discriminatory denial of the use they proposed] as ripe for review before the County has finally determined the use it will allow is that damages are not calculable. An excessive jury verdict in such a case is hardly surprising. Any verdict based upon sheer speculation about the amount of damages is prone to be excessive because it is not constrained by any appropriate measure of actual damages.

App. C at A-44, 834 F.2d at 1507 (dissenting opinion).

Another panel of the Ninth Circuit has also recognized that "ripeness" serves two purposes in litigation testing the constitutionality of land-use regulation: to establish a complete record of all the bases of the regulator's actions, and to afford a rational basis for measuring damages. *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986).

This Court must now address the issue of "ripeness" in section 1983 land-use cases as it relates to calculation of damages. To date the Court has articulated the necessity of final action on a land-use application, and application for a variance where available, to establish that a constitutional violation has occurred. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). (Even the Ninth Circuit majority in this case recognizes the need for a landowner-plaintiff to secure the municipality's " 'final definitive position regarding how it will apply the regulations at issue to the particular land in question.' " App. D at A-46, 857 F.2d at 568-569, quoting *MacDonald*, 477 U.S. at 350, and *Williamson County*, 473 U.S. at 191. But the majority erroneously thought this requirement was fulfilled by respondents' establishing that their 32-unit proposal would be "conclusively rejected." App. D at A-49, 857 F.2d at 570. The majority failed to follow *MacDonald's* additional requirement that the landowner secure "a final and authoritative

determination of the type and intensity of development *legally permitted* on the subject property." 477 U.S. at 348 (emphasis added). Had the Ninth Circuit required finality for purposes of proving or disproving the constitutional claim, the County could have articulated the grounds on which it would permit development of the land. Such an articulation could have disproved the constitutional claims of due process and equal protection violations, by showing that for reasons independent of those complained of, the County rationally would have foreclosed respondents' development even if respondents had secured the consistency determination.)

The unique posture of this appeal, with its focus on damages as well as liability, now enables the Court to proceed beyond *MacDonald* and articulate the importance of "finality" and "ripeness" for the separate purpose of assessing damages. This Court's treatment of the issue is now nearly unavoidable, given the preceding Term's holding that damages form a proper remedy for unconstitutional land-use regulation. *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S.Ct. 2378 (1987).

Any attempt by the present litigants to retry the damages on the limited guidance of the Ninth Circuit's opinion will only demonstrate the need for proof of the level of and grounds for permitted development. Interpreting its ruling generously, the Ninth Circuit seems to suggest that, on the premise the County wrongfully denied a consistency determination, respondents should be compensated for temporarily being deprived of a validly-determined development allowance. App. C at A-39 to A-40, 834 F.2d at 1505-1506. Without the respondents' having pursued a valid development allowance, the jury simply cannot know the two necessary ingredients for the panel's theory of damages: length of delay and value of permitted use. *See* App. C at A-41, n. 23, 834 F.2d at 1507, n. 23. The jury will be left to speculate as to these ingredients in its effort to calculate damages.

Alternatively, if the jury attempts to follow another of the Ninth Circuit's suggestions for measuring damages—"the difference between the value of the property immediately before the County's inconsistency determination and its value immediately

after that determination," App. C at A-41, n. 23, 834 F.2d at 1507, n. 23—that measurement will similarly prove speculative. An expert witness called to testify as to how much more or less he would pay for the property after the inconsistency determination would necessarily need to "estimate what level of development he was likely to be permitted by the County." *Id.* But damage awards against local governments under section 1983 should not turn on the jury's impressions of a battle of speculating witnesses. To establish rationally the level of damage, if any, a landowner must prove from *actual county decisions* the level of development allowable. The landowner must make its case ripe in the administrative process before coming to court.

Judge Tang stands as Thoreau's "majority of one" among his panel's colleagues in articulating the importance of finality to the assessment of damages in section 1983 land-use cases. This case presents to the Court the opportunity to complement and complete the work of *MacDonald* and *Williamson County*. The authorization of damages in *First English* requires the Court to speak now and govern the new wave of section 1983 litigation that *First English* engenders.

IV

DISQUALIFICATION OF A DISTRICT COURT JUDGE WHO PRESIDED AT THE LAND-USE TRIAL OF THE SAME COUNTY WITH WHICH HE HAD A LAND-USE DISPUTE IS NECESSARY TO MAINTAIN PUBLIC CONFIDENCE IN THE JUDICIARY

Granting of certiorari will enable the Court to ensure that no federal or state judge again commits the unfortunate error of the Honorable Stanley Weigel, who presided over the trial of this case. While disqualification of Judge Weigel will grant the County of Sonoma no more relief than that to which it is entitled under the other grounds of this petition,[5] this Court's disqualifica-

[5] Disqualification would only lead to a new trial. Reversal of judgment on the grounds asserted in parts I-III should lead to dismissal of the action.

tion will restore public confidence in the judiciary's ability to conduct its business above reproach.

The Ninth Circuit's opinion roughly states the facts on which Judge Weigel's disqualification is warranted. App. C at A-32 to A-33, A-34, 834 F.2d at 1494, 1501. At voir dire, Judge Weigel inquired of prospective jurors if any of them had applied for development or advocated no development in Sonoma County. R.T. 1-51. The Judge knew that such an experience would disqualify them as jurors, and he expected any juror with that experience to step aside. Regrettably, Judge Weigel did not disclose the fact that he himself had experienced a significant land-use dispute with the County.

While the dispute did not materialize in the public arena so that the County would have contemporaneously known of it, after trial the County learned the following facts: Judge Weigel owned two substantial parcels in Sonoma County. These parcels were downzoned in the same 1978 General Plan that also framed the issues in the present case. Judge Weigel engaged both a real estate representative and attorney (with whom the judge conferred at least a dozen times) in an effort to forestall or foreclose the downzoning. Soon thereafter, the Judge sold both parcels for significantly less than they would have been worth without the downzoning. C.R. 142; C.R. 158.

Regretfully, Judge Weigel's own experience as a landowner attempting to obtain a higher land-use density from Sonoma County manifested itself during trial against the County. See C.R. 142, Exs. I and J.

Judge Weigel began the trial by attempting to force the County to waive a unanimous jury and called the County's trial counsel unreasonable when he refused the waiver. R.T. 1-92; *see also* R.T. 1-27 to 1-30, 10-170. During trial, Judge Weigel repeatedly praised respondents' witnesses, qualified them as experts, and led them into testimony adverse to the County. *E.g.*, R.T. 2-51 ("you [respondent Herrington] want the jury to understand all the trouble you had and I have no doubt that you had trouble"), 2-175 to 2-176, 3-89 to 3-90, 3-183 to 3-187, 3- 191 to 3-194, 3-198 to 3-201, 3-234 to 3-236, 5-60 to 5-61, 6-21 to 6-22.

In contrast, Judge Weigel criticized the County's witnesses and suggested that the County had relied on dishonest staff people. *E.g.*, R.T. 3-234 to 3-236, 4-111, 7-99 to 7-100.

Repeatedly Judge Weigel suggested through questioning that respondents had no alternative but to go to court. R.T. 7-116 to 7-117; *see also* R.T. 3-89 to 3-90, 3-194, 3-198 to 3-201, 9-21 to 9-22. Repeatedly also Judge Weigel interrupted the County's cross-examination of adverse witnesses to make points harmful to the County. R.T. 2-175 to 2-176, 2-186 to 2-188, 3-234 to 3-236, 3-240 to 3-242, 3-255, 4-60, 5-40 to 5-42, 5-60 to 5-65, 6-21 to 6-22.

Judge Weigel's conduct after trial further manifested his extra-judicial bias. After trial Judge Weigel conducted a three-hour hearing on an application for an order shortening time. The cold transcript itself, C.R. 163, reflects an extraordinary degree of passion. Although at trial Judge Weigel stated that he was not biased against the former Assistant County Counsel, R.T. 11-37 and 11-38, at the hearing Judge Weigel repeatedly admitted to bias against her while denying any bias against Sonoma County. C.R. 163, at 64, 65, 72, 74, 92-92. The three-hour hearing was essentially an extended and unjudicial attempt to browbeat the assistant into abandoning the motion to disqualify. The next day, in a bitter order, Judge Weigel recused himself. C.R. 161.

The impropriety and appearance of impropriety in this case is undeniable; the community's outrage is reflected in Sonoma County's leading newspaper (which had previously supported the respondents against the County):

> Another Ambush at Quail Hill?
>
> * * *
>
> Did Judge Weigel, as county attorneys claim, show bias against the county's defense of its planning decision? And if he did, did his actions and statement influence the jury?
>
> No one can answer those questions with certainty, but under the circumstances, certain answers aren't required.

> If the county's representations about the judge's property holdings are correct, Judge Weigel should have disqualified himself, or at least, disclosed his holdings before the trial began and given Sonoma County officials the opportunity to decide whether a motion for disqualification was necessary.
>
> In appearance, if not in fact, his failure to do so raises questions about the impartiality of the proceedings. And while we do not pretend to understand the legal niceties, we suspect a higher court will concur in the county's motion for a new trial.
>
> If that's the case, Judge Weigel's failure to disclose his property holdings prove to be a disquieting error, an error which makes the first trial nothing more than a waste of time and money.

Editorial, Santa Rosa Press-Democrat, January 2, 1986, exhibit to C.R. 201.

On this record the Ninth Circuit concluded "that the County has not demonstrated that Judge Weigel should have disqualified himself prior to trial." App. C at A-35, 834 F.2d at 1503. As a matter of constitutional principle, however, this Court has required disqualification "to prevent even the probability of unfairness," *In Re Murchison*, 349 U.S. 133, 136 (1955), and when the "situation . . . 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clean, and true.' " *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986). The disqualification must be *nunc pro tunc*. *Id.* at 827-828; *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147-150 (1968); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

The statutory standards for disqualification of federal district judges are even more exacting, requiring disqualification where the judge's impartiality "*might* reasonably be questioned." 28 U.S.C. section 455(a) (emphasis added). Of course they also require disqualification in the case of actual bias. 28 U.S.C. section 144, 455(b)(1).

The Ninth Circuit's failure to find on this record that disqualification was required evidences the need for this Court's further elucidation of the standards for judicial recusal. The community, even that segment supporting respondents' efforts to develop their land as they wished to, finds offense in Judge Weigel's failure to recuse himself or even disclose the same personal history that he expected prospective jurors to disclose. Great as the public interest remains in resolution of the substantive dispute between the parties, public confidence in an impartial judiciary compels with equal force this Court's disapproval of Judge Weigel's failure to disclose and failure to disqualify.

The County emphasizes that it raises the issue of Judge Weigel's qualification with pain. Judge Weigel has been respected in this bar and community for his length of service and zeal in protecting the exercises of individual freedom. *See, e.g., Northwest Indian Cemetery Protective Assn. v. Peterson,* 565 F.Supp. 586 (N.D. Cal. 1983), *affirmed in part and vacated in part,* 764 F.2d 581 (9th Cir. 1985), *affirmed on rehearing,* 795 F.2d 688 (9th Cir. 1986), *reversed sub. nom. Lyng v. Northwest Indian Cemetery Protective Assn.,* 108 S.Ct. 1319 (1988). Nonetheless, we must present our claim of disqualification, for the good of the County of Sonoma, and of the public of Sonoma—and in the hope that this Court's guidance will spare future counsel from the necessity of raising a similar claim.

CONCLUSION

For reasons stated in this petition, the Court should grant certiorari to the Ninth Circuit Court of Appeals.

Dated: January 9, 1989

Respectfully submitted,

ANTONIO COSBY-ROSSMANN
380 Hayes Street
San Francisco, CA 94102
(415) 861-1401
Counsel of Record

JAMES P. BOTZ
County Counsel
STEPHEN K. BUTLER
Assistant County Counsel
County of Sonoma
575 Administration Drive
Santa Rosa, CA 95401
(707) 527-2421
Counsel for Petitioner

Appendix A

United States District Court
Northern District of California

No. C-80-2227-CAL

John Herrington, et al.,
Plaintiffs,

v.

County of Sonoma,
Defendant.

[Filed Sept. 9, 1986]

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND JUDGMENT N.O.V. AND DENYING PLAINTIFFS' MOTION FOR SANCTIONS

On July, 24, 1986, Defendant's Motions for a New Trial and for Judgment N.O.V., and Plaintiffs' Motions for Sanctions and for Entry of Judgment, were heard by this court. Having reviewed the entire trial transcript and having considered the record, briefs, arguments of counsel, and applicable authorities,

IT IS HEREBY ORDERED that:

1. Defendant's Motions for a New Trial and for Judgment N.O.V. are, and each of them is, denied. The grounds for the court's denials were fully stated orally by the court at the July 24 hearing, were duly reported by the court reporter [C.R. 229], and need not be repeated in this order.

2. Plaintiffs' motion for sanctions is denied.

3. The judgment is signed and filed this date.

4. This court reserves rulings on the amount of litigation expenses and attorneys' fees to be awarded to plaintiffs until application is made by plaintiffs pursuant to 42 U.S.C. Section 1988.

Dated: September 9, 1986.

/s/ CHARLES A. LEGGE
Charles A. Legge
United States District Judge

Appendix B

United States District Court
Northern District of California

No. C-80-2227-CAL

John Herrington, et al.,
Plaintiffs,

v.

County of Sonoma,
Defendant.

[Filed Sept. 9, 1986]

JUDGMENT

IT IS ORDERED, DECLARED AND ADJUDGED that:

1. Judgment on the jury verdict is entered in favor of plaintiffs and against defendant County of Sonoma for Two Million Five Hundred Thousand Six Hundred Dollars ($2,500,600).

2. The Sonoma County Board of Supervisors' December 11, 1979, denial of plaintiffs' subdivision, as described in Resolution Number 65069, is invalid.

3. Plaintiffs are adjudged to be the prevailing parties in this action, as defined in 42 U.S.C. Section 1988. The court reserves ruling on the amount of attorneys' fees and litigation expenses to be awarded plaintiffs until application is made pursuant to 42 U.S.C. Section 1988.

4. Plaintiffs are awarded costs of litigation. Costs will be taxed upon compliance with Local Rule 270.

5. Post-judgment interest is awarded pursuant to 28 U.S.C. Section 1961.

Dated: September 9, 1986.

/s/ CHARLES A. LEGGE
Charles A. Legge
United States District Judge

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN S. HERRINGTON, DAVID S. HERRINGTON and QUAIL HILL RANCH, a partnership, *Plaintiffs/Appellees Cross-Appellants,* v. COUNTY OF SONOMA, *Defendant/Appellant/ Cross-Appellee.*	Nos. 86-2620; 86-2728 D.C. No. C 80-2227 CAL ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
July 15, 1987—San Francisco, California

Filed December 24, 1987
Amended February 10, 1988

Before: Herbert Y. C. Choy, Senior Circuit Judge, Joseph T. Sneed and Thomas Tang, Circuit Judges.

Opinion by Judge Choy; Dissent by Judge Tang

SUMMARY

Constitutional Law/Land Use and Zoning/Courts and Procedure

Appeal from judgment. Affirmed in part, vacated in part and remanded.

Appellee the Herringtons own a 540-acre property in Sonoma County and in connection therewith began preparing a subdivision proposal. Meanwhile, appellant County of Sonoma prepared a General Plan creating the basis for subsequent planning efforts. Development proposals which are inconsistent with the General Plan must be rejected by the governing authority. The Plan set a maximum density of 35 residential units for the Herrington property. The Herringtons developed a subdivision proposal consisting of a 32-unit subdivision. The County planning staff found the Herrington proposal to be inconsistent with the Plan. The Herringtons appealed the determination of inconsistency. The County Planning Commission found the subdivision consistent with the Plan. A County Supervisor appealed the Planning Commission's consistency finding to the County Board of Supervisors. They delegated to the County's Agricultural Committee the task of evaluating the agricultural viability and the impact of the Herrington proposal. The vote was against the Herringtons. The Board of Supervisors then met to review the Herrington proposal and found the 32-unit subdivision inconsistent with the Plan. Pursuant to the county's Specific Plan, the Herrington property was downzoned to a maximum of seven residential units. They sued and at trial they argued that the County's decisions effected a taking of their property without just compensation. Second, they alleged that they were not given adequate notice and an opportunity to be heard in regard to several of the County's decisions about their land. Third, they claimed that the inconsistency determination and the downzoning were irrational, arbitrary, and capricious because the decisions were unsupported by the evidence. Fourth, they argued that they had been deprived of equal protection of the law because the County approved, within two years after the inconsistency determination, three major subdivisions on agricultural land. The Herringtons eventually abandoned their taking claim. The issue of the County's liability for constitutional violations and the request for monetary damages were submitted to the jury on agreed instructions. The jury returned a verdict for the Her-

ringtons, and awarded damages of $2,500,600. Following the jury verdict, the County moved to disqualify the trial judge. The judge denied the motion, but then recused himself because of the developing antagonism between the judge and the County attorney. The county moved for a JNOV, a new trial and a new trial on damages. All three requests were denied.

[1] The district court erred in submitting the ripeness issue to the jury; it is a question of law which must be determined by the court. [2] In land use challenges, ripeness is intended to avoid premature adjudication or review of administrative action. [3] The doctrine requires a *final decision* by the government which inflicts a concrete harm upon the plaintiff landowner. The requirement applies to the Herringtons' substantive due process and equal protection claims. [4] A final decision requires at least: (1) a rejected development plan, and (2) a denial of a variance. [5] The County contends that the Herringtons' subdivision application was not complete because it did not contain an EIR. However, submission of an EIR would have made no difference in the County's inconsistency determination. Further, the proposal was conclusively rejected. [6] The second factor need not be met because the testimony indicates that such an application would have been futile. [7] A landowner must in certain circumstances obtain a decision as to the feasibility of *less intensive development* in order for a taking claim to ripen. [8] In order to succeed with a regulatory taking claim, a property owner ordinarily must demonstrate that substantially all economically viable use of the property has been denied.

[9] The Herrington's due process and equal protection claims do not require proof that *all use* of their property has been denied. The Herringtons are not required to speculate as to what forms of less intensive development might have been permitted by the County. Such speculation is irrelevant. [10] The County's liability for constitutional violations was submitted to the jury on agreed instructions. [11] In light of this,

it cannot complain of the instructions on appeal. [12] The County argues that the district court incorrectly denied its motion for JNOV. [13] The County failed to renew their motion for a directed verdict at the close of all the evidence, a prerequisite for a post-trial motion for JNOV. [14] The Herringtons have presented evidence to support each theory of liability submitted to the jury. [15] The trial record does not indicate that the judge was biased against the County. [16] The restrictions placed by the County on the land formerly owned by the judge created neither actual nor apparent bias on the judge's part. [17] Further, the judge had no financial interest in the outcome of the lawsuit. [18] The $2.5 million damages award is grossly excessive because it is in excess of the property's value and the County's unlawful acts have not permanently deprived the Herringtons of any development potential to which they are entitled.

The dissent argues that the Herringtons' claims are simply not ripe for review and should have Herringtons' claims are simply not been dismissed by the district court.

COUNSEL

Jess S. Jackson, Barbara R. Banke, and Frederik A. Jacobsen, San Francisco, California, for the plaintiffs/appellees/cross-appellants.

James P. Botz, Santa Rosa, California; Antonio Rossmann, Anita E. Ruud, San Francisco, California, for the defendant/appellant/cross-appellee.

John K. Van De Kamp, Attorney General of the State of California, Sacramento, California, for the amicus curiae State of California. Michael H. Remy, Sharon E. Duggan, Remy & Thomas, Sacramento, California, for the amicus curiae Western Sonoma County Rural Alliance.

ORDER

The majority panel opinion filed herein on December 24, 1987 is amended by the insertion therein at slip sheet page 37, line 5 of the first full paragraph after the word "application" a new footnote 23 reading as follows:

> The only injury has been to delay the utilization by Herrington of the property in its highest and best permissible use.
>
> On the present record we know neither the proper length of that delay nor the "highest and best permissible use." The two unknowns are related; only by ascertaining the latter can the former be approximated. Moreover, it is possible that some of the actual delay in development is due to the failure of Herrington to mitigate damages. These deficiencies in the record are enough to justify the rejection of the $2,500,600.00 award. However, they also suggest that the trial court may well be at sea in its attempt to fix damages. How is it to determine what is the property's "best permissible use" and at what point in time that utilization will, or would have, become possible? It is likely the district court will seek out a surrogate measure of damages.
>
> One such measure would be the difference between the value of the property immediately before the County's inconsistency determination and its value immediately after that determination. A fully informed buyer after the County's inconsistency determination, in fixing the price he would be prepared to bid, would attempt to estimate what level of development he was likely to be permitted by the County. Of course, such a buyer would like to purchase the property on the assumption that no development would be permitted. The owner very

likely would be unwilling to sell at such a figure, which in this case appears to be $490,000.00.

On the other hand, a buyer immediately before the inconsistency determination is not likely to pay a price measured by assuming approximately 32 units would be authorized. He would know there is a risk that many fewer units would be authorized and his bid price would be lowered to account for this possibility. Thus, such a buyer would not be likely to pay $1.3 million.

This suggests that should this surrogate measure be employed recoverable damages should be somewhat less than $810,000.00. The possible availability of prejudgment interest presents an issue the trial court should explore. The present record discourages any effort to express an opinion on that issue at this time.

No doubt other approaches to the measurement of damages will emerge in the hearings on remand.

OPINION

CHOY, Circuit Judge:

John and David Herrington (the "Herringtons") brought suit under 42 U.S.C. § 1983 against the County of Sonoma (the "County") for, inter alia, alleged violations of their procedural due process, substantive due process, and equal protection rights secured under the Fourteenth Amendment. The constitutional claims arise out of the County's rejection of the Herringtons' subdivision application, and the subsequent downzoning of the area in which the Herringtons' land is located. The County appeals from a judgment awarding the

Herringtons injunctive relief and a jury award of $2,500,600 in damages. We uphold the jury's verdict that the County is liable for due process and equal protection violations, and affirm the award of injunctive relief. We vacate the award of damages as grossly excessive, and remand for a new trial on the damages issue.

BACKGROUND

The Herringtons own a 540-acre property in Sonoma County, ten miles west of the town of Sebastopol. The property once operated as a dairy farm; the dairy operation was shut down in 1962 after being cited for polluting a stream. The Herringtons then leased their land to local farmers for grazing and production of oat hay. The farming efforts were largely unsuccessful, and, in 1976, the Herringtons contacted the County planning staff about the possibility of residential development of their property. Over the next two years, the Herringtons—in consultation with the County planning staff—began to prepare a subdivision proposal. The Herringtons originally envisioned a 103-unit residential development. The proposal became less ambitious over time in accordance with the planning staff's recommendations.

Meanwhile, between 1976-78, the County was preparing its General Plan. California law requires each county to have a valid and internally consistent general plan. Cal. Gov't Code § 65300 (West 1987). The general plan is a "statement of development policies" consisting of "a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals." *Id.* § 65302. It has been described as " 'a constitution for all future development[].' " *deBottari v. Norco City Council*, 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790, 795 (1985) (quoting *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 42 Cal. Rptr. 283, 288 (1965)). The general plan creates the basis for subsequent planning efforts, such as specific plans. *See* Cal. Gov't Code §§ 65450-57 (West 1987). Development proposals which are inconsistent with the general plan must

be rejected by the governing authority. *Id.* § 66474(a) (West 1983).

Before the Herringtons formally initiated the subdivision application process, the County planning staff instructed the Herringtons to delay filing an application until the General Plan was complete. In January 1978, the County adopted its General Plan. The General Plan set a maximum density of 35 residential units for the Herrington property. The plan also contained qualitative policy goals in favor of maintaining the County's agricultural viability and preserving its forest resources. The 35-lot maximum on the Herrington property was subject to reduction if necessary to protect the General Plan's environmental goals.

From 1978-79, the Herringtons continued to work with the planning staff to develop an acceptable subdivision proposal. According to the Herringtons, the staff gave them no indication that the evolving proposal would be inconsistent with the General Plan. On May 24, 1979, the Herringtons filed an application with the County for a 32-unit subdivision.[1] The application was accompanied by a tentative subdivision map prepared by a civil engineer, a project proposal containing a narrative description of the project, and a $600 filing fee. The project preserved 300 acres of open space, a 35-acre redwood grove, and 90 acres of agricultural land previously used to raise oat hay.

On June 6, 1979, the County planning staff found the Herrington proposal to be inconsistent with the General Plan because of its density, design, and conflict with resource preservation.

---

[1]The County contends that this application sought only a preliminary finding of consistency with the General Plan, and did not meet the requisites of a formal subdivision application. A formal subdivision application must be accompanied by an environmental impact report. Although the Herringtons submitted environmental "studies" with their application, they did not prepare an environmental impact report.

The Herringtons appealed the County planning staff's determination of inconsistency to the County Planning Commission. The Planning Commission heard the appeal on August 2, 1979. The planning staff presented a report at the hearing which, according to the Herringtons, contained several misrepresentations of fact and law. These alleged misrepresentations were: the property lacked water; a Citizen's Advisory Committee had reacted negatively to the proposal; the property had development limitations such as unstable soils; and the proposal conflicted with the pending West Sebastopol Specific Plan and was therefore unacceptable. The Planning Commission nevertheless reversed the staff determination and found the Herringtons' subdivision to be consistent with the General Plan.

Pursuant to County procedure, County Supervisor Eric Koenigshofer appealed the Planning Commission's consistency finding to the County Board of Supervisors. On November 13, 1979, the Board of Supervisors held a hearing. The planning staff again prepared an allegedly inaccurate report and presented it to the Board. The Board deferred decision of the appeal, and delegated to the County's Agricultural Technical Advisory Committee the task of evaluating the agricultural viability of the Herringtons' property and the impact of the Herrington proposal on the County's agricultural resources.

The Agricultural Committee held a meeting on November 28, 1979, without giving notice to the Herringtons. The Herringtons nonetheless attended the meeting, but were prohibited from speaking.[2] At the meeting, a County planning staff representative who supervised the Agricultural Committee distributed copies of the Herrington development proposal. These copies had been altered from the original document submitted by the Herringtons. The County states that the

[2]The Agricultural Committee had made a field inspection of the Herrington property with the developers on November 26.

original document was merely edited because the Agricultural Committee was concerned only with those parts of the document which pertained to agricultural resources. The Herringtons contend that the alterations were a deliberate attempt to misrepresent the Herrington proposal. The Agricultural Committee voted five to two against the Herringtons' subdivision.

On December 11, 1979, the Board of Supervisors met to review the Herrington proposal. The Agricultural Committee submitted a memorandum to the Board which allegedly misrepresented that the Herrington property was agriculturally viable and that the land surrounding the property was agricultural rather than residential. In accordance with the Agricultural Committee's recommendation, the five-member Board voted unanimously to find the 32-unit subdivision proposal inconsistent with the General Plan. Specifically, the Board found the proposed density to be inconsistent with the preservation of agricultural and timber resources on the Herringtons' parcel.

During this period, the Board of Supervisors had been developing the West Sebastopol Specific Plan, which was intended to implement the policies of the General Plan. *See* Cal. Gov't Code § 65450 (West 1987). Under California law, the specific plan must include text and diagrams which specify, inter alia: "[s]tandards and criteria by which development will proceed, and standards for the conservation, development, and utilization of natural resources, where applicable." *Id.* § 65451(a)(3).

The Herringtons participated in preliminary hearings regarding the Specific Plan. At a meeting on March 4, 1980, the Board adopted the Specific Plan, which called for the preservation of agricultural and timber resources, and downzoned the Herrington property to 100-acre minimum lot sizes. This downzoning restricted the Herrington property to a maximum of seven residential units. The Herringtons claim

that they were not given an adequate opportunity to be heard regarding the downzoning, apparently because they were excluded from the March 4 meeting. The County states that no members of the public were allowed to attend this final meeting, because it was held solely for deliberation by the Board of Supervisors.

In June 1980, the Herringtons filed suit against the County pursuant to 42 U.S.C. § 1983. At trial they asserted four claims against the County, and sought injunctive relief and monetary damages. First, the Herringtons contended that the County's determination that the 32-lot proposal was inconsistent with the General Plan, and the subsequent decision to downzone the Herrington property under the Specific Plan, had denied the Herringtons all economically viable use of their land because the land was unsuitable for agriculture. Thus, the Herringtons argued, the County's decisions effected a taking of their property without just compensation in violation of the Fifth Amendment.[3] Second, the Herringtons claimed that the County's decisionmaking process was conducted in violation of the Herringtons' procedural due process right under the Fourteenth Amendment. Specifically, the Herringtons alleged that they were not given adequate notice and an opportunity to be heard in regard to several of the County's decisions about their land. In addition, the County staff allegedly tampered with the evidence. Third, the Herringtons claimed that the inconsistency determination and the downzoning were irrational, arbitrary, and capricious because the decisions were unsupported by the evidence. Therefore, these decisions violated the Herringtons' substantive due process right under the Fourteenth Amendment. Fourth, the Herringtons argued that they had been deprived

---

[3]The Just Compensation Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." This restriction is applied to the states through the Due Process Clause of the Fourteenth Amendment. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 175 n.1 (1985).

of equal protection of the law in violation of the Fourteenth Amendment. The equal protection claim derived from the County's approval, within two years after the inconsistency determination, of three major subdivisions on agricultural land. The Herringtons alleged that these properties shared identical physical characteristics with the Herrington property, and were governed by similar policies under the General Plan.

A ten-day jury trial was conducted in late 1985. After the evidence closed, the Herringtons abandoned their Fifth Amendment taking claim, and decided to pursue only their Fourteenth Amendment procedural due process, substantive due process, and equal protection claims.

The issue of the County's liability for constitutional violations was submitted to the jury on agreed instructions. The procedural due process instruction was: The "right to procedural due process includes the right to notice of any proceeding which will affect a final determination of plaintiffs' property rights and the opportunity to be heard and present objections in any such proceeding." The substantive due process instruction stated, inter alia: "If you find that the County's actions were arbitrary, unreasonable and capricious or capricious in regard to either rezoning plaintiffs' property or finding their proposed development inconsistent with the General Plan, then you must find that the defendant violated the plaintiffs' civil rights." The equal protection instruction was subsumed within the substantive due process instruction: "Similar pieces of property [may be treated] differently if the different treatment is ... not unreasonable, capricious or arbitrary."

The Herringtons' request for monetary damages was also submitted to the jury on agreed instructions. The damages instructions stated, inter alia: "The amount of your award shall include the following: First, any compensation due plaintiffs for loss of value of their property, second, in addi-

tion any compensation due plaintiffs for loss of profits that plaintiffs were prevented from earning by the actions of defendant, and third, compensation to plaintiffs for interest or return plaintiffs would have earned thereon."

The jury returned a general verdict for the Herringtons, and awarded damages of $2,500,600. Pursuant to a stipulation by the parties, the district court entered an order on September 10, 1986, declaring the County's inconsistency determination to be invalid. The General Plan and the Specific Plan were not affected by the judgment.

Following the jury verdict, the County moved to disqualify the trial judge, the Honorable Stanley A. Weigel, and vacate the proceedings, on the ground that Judge Weigel had owned property in Sonoma County and was biased in favor of the Herringtons. Judge Weigel denied the motion, but then recused himself from further proceedings in the case because of the developing antagonism between the judge and the County attorney. Judge Charles A. Legge was assigned to the remaining matters. The County moved for: a judgment notwithstanding the verdict on the ground that the Herringtons did not present sufficient evidence to support the jury's verdict; a new trial on the ground that Judge Weigel had been biased against the County; and a new trial on damages. The district court denied all three of these requests.

The County timely appeals the September 10, 1986, final judgment. The County raises six basic arguments on appeal: 1) the Herringtons' claims are not ripe; 2) the issue of the County's liability for constitutional violations should not have been submitted to the jury; 3) the County is entitled to a judgment notwithstanding the verdict due to lack of evidence; 4) the jury verdict constituted "plain error;" 5) the County is entitled to a new trial because Judge Weigel was biased against it; and 6) the award of damages is unfair and excessive. We reject all of these arguments, with the exception of the contention that the damages award cannot be allowed

to stand. The Herringtons cross-appeal the district court's denial of prejudgment interest on the jury's damages award from the date of the jury verdict to the date of entry of judgment. Because we vacate the jury's damages award, we do not reach the merits of the Herringtons' cross-appeal.

DISCUSSION

A. *Ripeness*

[1] The County contends that the Herringtons' claims are not ripe for adjudication. We note that the trial judge submitted the ripeness issue to the jury and that the jury implicitly found that the Herringtons' claims were ripe. However, the district court erred in submitting this issue to the jury; ripeness is a question of law which must be determined by the court. *See Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453 n.4 (9th Cir. 1987). We review the ripeness issue de novo. *Id.*

[2] In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable. The Supreme Court's most recent discussions of the doctrine of ripeness as applied to land use cases are contained in two taking cases: *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986), and *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985).

1. *Kinzli's Final Decision Requirement*

[3] In *Kinzli*, we interpreted *Williamson* and *MacDonald* to require a *final decision* by the government which inflicts a concrete harm upon the plaintiff landowner. *Kinzli*, 818 F.2d at 1454. We held that a final decision requires at least: "(1) a rejected development plan, and (2) a denial of a variance." *Id.*

(citing *Williamson*, 473 U.S. at 187-90). The preliminary question for us is whether the *Kinzli* final decision requirement, derived from the Supreme Court's taking cases, applies to the due process and equal protection claims asserted by the Herringtons. We conclude that the requirement applies to the Herringtons' substantive due process and equal protection claims. We find it unnecessary to determine whether the final decision requirement also applies to the Herringtons' procedural due process claim.

In *Kinzli*, we held that a landowner's suit alleging a taking without just compensation, and violations of substantive due process and equal protection, was not ripe until the defendant had made a final determination regarding the application of its regulations to the subject property. *Kinzli*, 818 F.2d at 1455-56. The equal protection issue presented in *Kinzli* was whether the government's treatment of the landowner "bears no rational relationship to a legitimate government purpose." *Kinzli*, 818 F.2d at 1455 n.7. This equal protection claim is similar to the substantive due process and equal protection claims asserted by the Herringtons.[4] Thus, we conclude that the *Kinzli* final decision requirement is applicable to the Herringtons' substantive due process and equal protection claims.

It is not clear whether the Herringtons' procedural due process claim is subject to the final decision requirement. In *Norco Construction, Inc., v. King County*, 801 F.2d 1143 (9th Cir. 1986), we held that "claims for inverse taking, and for *alleged related injuries* from . . . denial of [procedural] due process by unreasonable delay or failure to act under mandated time periods, are not matured claims until planning authorities and state review entities make a final determina-

---

[4]Scrutiny under ordinary equal protection analysis is essentially equivalent to scrutiny under substantive due process doctrine. *Construction Industry Association v. City of Petaluma*, 522 F.2d 897, 906 n.11 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

tion on the status of the property." *Norco*, 801 F.2d at 1145 (emphasis added). We indicated that the final decision requirement was applicable to a procedural due process claim for unlawful delay in the processing of a development application because "[t]he duration of the wrongful taking may be relevant to determining whether a wrong has occurred, as well as the extent of the damage suffered." *Id.*

The *Norco* rationale does not appear to apply with equal force to the Herringtons' procedural due process claim. *Norco* is distinguishable from the case at hand because the Herringtons' procedural due process claim is not related to a taking claim. *Norco* is concerned with instances where a landowner claims that a procedural due process violation in the form of delay has contributed to a taking due to destruction of a property's beneficial use. *See id.* at 1145. In such cases, *Norco* requires a formal and final *decision* which effectively destroys beneficial use. In the instant case, because the Herringtons have withdrawn their taking claim, they do not rely on the argument that the County's alleged procedural due process violations constitute part of a decision to preclude all viable use of their property. Thus, it is not clear that the Herringtons should be required to wait until a "final decision" about their land has been made before challenging the decisionmaking process. However, we need not reach this issue, because we find that the Herringtons have satisfied the final decision requirement enunciated in *Kinzli*. We will assume that this requirement applies equally to the Herringtons' procedural due process, substantive due process, and equal protection claims.

[4] As stated above, in *Kinzli* we held that a "final decision" requires at least: "(1) a rejected development plan, and (2) a denial of a variance." *Kinzli*, 818 F.2d at 1454 (citing *Williamson*, 473 U.S. at 187-90). We noted that a landowner may avoid the final decision requirement if attempts to comply with the requirement would be futile. *Id.* However, a property owner cannot rely on the futility exception until at

least one meaningful application has been made. *Id.* at 1454-55. We found that the development application made by a developer in *Kinzli* was not meaningful because it had been "abandoned at an early stage in the application process." *Id.*[5] In the instant case, we conclude that the Herringtons have satisfied the *Kinzli* final decision requirement.

[5] There is some controversy as to whether the Herringtons submitted even one development application to the County, and as to whether their proposed 32-lot subdivision was conclusively rejected. The County contends that the Herringtons' subdivision application was not complete because it did not contain an Environmental Impact Report ("EIR"). Instead of submitting an EIR, plaintiffs submitted a series of environmental studies. However, it is apparent from testimony by the County staff that submission of an EIR would have made no difference in the County's inconsistency determination. The County also characterizes the Board's inconsistency determination as a "preliminary" rather than a final decision. Nevertheless, it is clear that the 32-lot proposal was conclusively rejected when the inconsistency determination was made by the Board of Supervisors. Former County Planner Toby Ross testified that the Board's inconsistency determination constituted a final decision with respect to the Herringtons' proposed subdivision. He further testified that the only way for the Herringtons to obtain approval for their project, other than going to court, was to seek a General Plan amendment. The Herringtons, Ross stated, would have had no chance of obtaining a General Plan amendment. Michael Morrison, who was the County Subdivision Planner at the time of the Herringtons' application, gave similar testimony.

---

[5]The Kinzlis had attempted to sell their property under contracts conditioned upon receipt from the City of Santa Cruz of permission for residential development. One potential purchaser filed a development application on behalf of the Kinzlis. "However, he did not pursue the application once he was told by a staff engineer . . . that the City could not provide water services to the property." *Kinzli*, 818 F.2d at 1452.

Morrison stated that the Herringtons' only recourse after the inconsistency determination was to seek a General Plan amendment. He did not consider this to be a practical alternative.

This testimony demonstrates that the first *Kinzli* requirement—a rejected development plan—has been satisfied by the Herringtons. Although we do not believe that the Herringtons' development application was formally complete, we agree with the Herringtons' contention that the 32-lot development, as it was originally proposed, was definitively rejected by the County. Once the inconsistency determination was made, it would have been futile for the Herrington's to pursue their application for the 32-lot development. The fact that the Herringtons abandoned their application at a "preliminary" stage (i.e., after the inconsistency determination) does not affect our conclusion that a rejected development plan has been obtained in this case. The purpose of the Sonoma County consistency determination process is to enable a developer to determine at a preliminary stage whether to proceed with a particular development application. The County's determination of inconsistency effectively told the Herringtons to stop the application process in regard to the 32-lot proposal. Under the circumstances of this case it would be inappropriate to require the Herringtons to have formally completed a hopeless application.

[6] The Herringtons did not apply for a variance. Nevertheless, the second *Kinzli* factor—application for a variance—need not be met in this case because the testimony at trial indicates that such an application would have been futile. The testimony states that the *only* means of obtaining approval of the 32-lot proposal after the inconsistency determination was through a General Plan amendment. This testimony finds support in Cal. Gov't Code § 66474(a) (West 1983), which *requires* a county to reject a development proposal which is inconsistent with the general plan. Thus, section 66474(a) would appear to prohibit variances for

inconsistent developments. Application for a variance was not a viable option for the Herringtons.

In sum, we hold that the Herringtons have satisfied the "final decision" ripeness requirement enunciated in *Kinzli*. The Herringtons' 32-lot development proposal was conclusively rejected by the County. Efforts to complete the development application, and application for a variance, would have been futile. In so holding, we emphasize that mere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility. *See Williamson*, 473 U.S. at 188; *Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926, 942 (D. Haw. 1986). Our holding is based upon repeated and uncontradicted testimony by County officials that the Herringtons' 32-lot proposal could not have obtained approval.

2. *MacDonald's Reapplication Requirement*

[7] However, our ripeness analysis cannot stop here. In *MacDonald*, the Supreme Court found that a landowner's taking claim may not be ripe even if a final decision has been made that the landowner's *initial* development proposal is unacceptable. *MacDonald*, 106 S. Ct. at 2568 & n.8. Under *MacDonald*, a landowner must in certain circumstances obtain a decision as to the feasibility of *less intensive development* in order for a taking claim to ripen. *Id.* We conclude that the *MacDonald* reapplication requirement is not applicable to the Herringtons' due process and equal protection claims.

In *MacDonald*, the developer submitted a tentative subdivision map for 159 residential lots. The proposal was rejected by the Yolo County Board of Supervisors because it was not consistent with Yolo County's General Plan and Specific Plan. The developer brought suit, claiming that the County's rejection of the subdivision proposal had effected a taking because the land was not economically viable in its existing

agricultural use. The Supreme Court held that the developer's taking claim was not ripe. The Court found that the developer had not received the county's " 'final definitive position regarding how it will apply the regulations to the particular land in question.' " *Id.* at 2568 (quoting *Williamson*, 473 U.S. at 191). In concluding that the developer's claim was not ripe, the Court placed particular reliance on the fact that the County had denied only one specific proposal for intense residential development. There was no indication that all profitable development had been foreclosed. *See id.* at 2568 & n.8. The Court stated that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *Id.* at 2569 n.9. Thus, the Court concluded that the County had not made a final decision that denied all use of the property at issue and thereby effected a taking. *Id.* at 2568-69. Implicitly, the Court suggested that landowners in such circumstances should submit an alternative development application in order to obtain a final decision pinpointing the impact of the applicable regulations.

This ripeness requirement of reapplication for alternatives has been employed in several taking cases. *See, e.g., Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1029 (3d Cir.), *cert. denied*, 107 S. Ct. 2482 (1987); *Kaiser*, 649 F. Supp. at 942; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 638 F. Supp. 126, 132-33 (D. Nev. 1986). However, it has not to our knowledge been applied in cases where the property owner argues only that denial of a development proposal is arbitrary or irrational and therefore in violation of the developer's due process and equal protection rights.

We accept the County's argument that, although it rejected the Herringtons' 32-lot proposal, there is no indication that an *alternative* less intensive proposal would not have been allowed by the County. However, we hold that there is a fundamental difference between the taking claim at issue in

MacDonald and the Herringtons' claims which precludes application to the instant case of the *MacDonald* reapplication requirement. We therefore conclude that the Herringtons' claims are ripe.

[8] In order to succeed with a regulatory taking claim, a property owner ordinarily must demonstrate that all or substantially all economically viable use of the property has been denied. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987); *MacDonald*, 106 S. Ct. at 2568-69; *Pace Resources*, 808 F.2d at 1031. A taking occurs when a regulation " 'goes too far.' " *MacDonald*, 106 S. Ct. at 2566 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). A regulation goes too far when it "becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson*, 473 U.S. at 199. In *MacDonald*, the developer contended that the County's denial of its subdivision proposal had precluded all viable use of the developer's land, and therefore sought compensation for inverse condemnation.[6] The claim was not ripe because the developer did not contend that *only* improvements pursuant to its original subdivision plan would avert a regulatory taking. *MacDonald*, 106 S. Ct. at 2568 n.8. The Court declined to speculate whether less intensive development would have been permitted; rather, it required the developer to obtain a final decision as to whether profitable alternatives would be allowed by the government. *See id.* at 2568-69.

---

[6] "Inverse condemnation" has been defined as "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *United States v. Clarke*, 445 U.S. 253, 257 (1980) (citation and emphasis omitted).

[9] In contrast, the Herringtons' due process and equal protection claims do not require proof that *all use* of their property has been denied. Unlike the developer in *MacDonald*, the Herringtons argue that the County *necessarily* had to approve their *original* development proposal (at the consistency determination stage) in order to avoid a constitutional violation. In challenging the County's inconsistency determination as arbitrary and capricious, the Herringtons do not require speculation as to what forms of less intensive development might have been permitted by the County. Such speculation is irrelevant to the issue of whether the inconsistency determination itself was arbitrary. Thus, the *MacDonald* reapplication requirement is not applicable here.[7]

---

[7]We do not believe that this holding will undercut the strict ripeness standard for taking cases set forth in *MacDonald*. That is, we do not believe that developers will simply rely on substantive due process claims in order to avoid the *MacDonald* ripeness test for takings. Taking claims and substantive due process claims are not fungible. We note at least three major distinctions between the two approaches.

First, both taking claims and substantive due process claims may involve an assessment of whether the contested action was a reasonable and proper exercise of the police power. However, the test for reasonableness under taking doctrine is arguably less deferential to the government's decision-making authority than the test for reasonableness under substantive due process. *Compare Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (taking case: regulation must "*substantially advance* legitimate state interests") (emphasis added); *Hall v. City of Santa Barbara*, 813 F.2d 198, 207 & n.25 (9th Cir. 1987) *with Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1980) (equal protection clause is satisfied if government "*could rationally have decided*" that the measure adopted might achieve the government's objective) (emphasis in original); *Ross v. City of Berkeley*, 655 F. Supp. 820, 842 (N.D. Cal. 1987) (substantive due process violation occurs when zoning measure has "no rational relation" to its objective). We acknowledge that the *Agins* reasonableness test quoted above is derived from an older substantive due process case. *See Agins*, 447 U.S. at 260 (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)). Nevertheless, the Supreme Court has suggested that the *Agins* taking test is less deferent than the current substantive due process test. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141, ___ n.3, 55 U.S.L.W. 5145, 5147 n.3 (U.S. June 26, 1987) (No. 86-133).

Our decision that the *MacDonald* reapplication requirement does not apply here is not affected by the Supreme Court's indication in *Williamson* that similar ripeness standards applied to the property owner's claim in that case whether it was analyzed under the Just Compensation Clause of the Fifth Amendment or under the Due Process Clause of the Fourteenth Amendment. *Williamson*, 473 U.S. at 199-200. The landowner in *Williamson* alleged that all viable use of the property at issue had been denied. The Court phrased the Due Process Clause version of the plaintiff's claim as follows: "regulation that goes so far that it has the same effect as a taking by eminent domain is an invalid exercise of the police power, violative of the Due Process Clause of the Fourteenth Amendment." *Williamson*, 473 U.S. at 197.[8] This due process claim is premised on an assertion that *all use* of the claimant's property has been denied. *See id.* at 199; *see also Ross v. City of Berkeley*, 655 F. Supp. 820, 844 (N.D. Cal.

Second, even if the government's action is a legitimate exercise of the police power, it is not insulated from a taking challenge. Proof that a regulatory decision "goes too far" does not require a showing that the decision is arbitrary or irrational. *See Nollan*, 107 S. Ct. at ___, 55 U.S.L.W. at 5152 (Brennan, J., dissenting); *Williamson*, 473 U.S. at 199; *Pace Resources*, 808 F.2d at 1030. In contrast, to prove that a zoning decision violates substantive due process, the property owner *must* show that the government "could have had no legitimate reason for its decision." *Shelton v. City of College Station*, 780 F.2d 475, 483 (5th Cir. 1986), *cert. denied*, 106 S. Ct. 3276, 107 S. Ct. 89 (1986). The burden on a landowner to prove that a land use decision is arbitrary or irrational is an extraordinarily heavy one. *See Pace Resources*, 808 F.2d at 1035; *Shelton*, 780 F.2d at 483; *Construction Industry Association v. City of Petaluma*, 522 F.2d 897, 905-08 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

Third, the appropriate damages award may be lower under a substantive due process claim than under a taking claim for inverse condemnation, because the property owner may not be able to obtain compensation for denial of all use of the property during the period of the violation.

[8]The Supreme Court declined to determine whether this form of due process claim was valid. *Williamson*, 473 U.S. at 199.

1987) (interpreting *Williamson*). Because the Herringtons' claims are not premised on such an assertion, *Williamson* does not require us to apply the identical ripeness standard for takings to the Herringtons' substantive due process, procedural due process and equal protection claims.[9]

To sum up, the Herringtons' claims meet the final decision requirement enunciated in *Kinzli*. The *MacDonald* reapplication requirement is inapplicable to this case because no taking by inverse condemnation has been alleged. The Herringtons' claims are ripe for adjudication.[10]

B. *Submission of Liability Issues to Jury*

[10] The issue of the County's liability for constitutional violations was submitted to the jury on agreed instructions. The County argues that the determination whether it violated the Herringtons' due process and equal protection rights was not for the jury to make because it involves issues of law. The County contends that the trial court should have determined if the legal standards for due process and equal protection were breached. We conclude that the County waived this argument.

[11] Nowhere below did the County assert that the liability issues could not be submitted to a jury. It agreed without reservation to the submission of the issues to the jury on the instructions given, and thus cannot complain of the instructions on appeal. *United States v. Kleifgen*, 557 F.2d 1293,

---

[9]Indeed, the Court expressly stated that the plaintiff's substantive due process, procedural due process, and equal protection claims were not at issue. *Williamson*, 473 U.S. at 182 n.4.

[10]*Williamson* also holds that a *taking* claim in federal court is not ripe until the plaintiff has sought "just compensation" from state entities. *Williamson*, 473 U.S. at 194-97. This requirement does not apply to the due process and equal protection claims at issue here. *See Cassettari v. County of Nevada*, 824 F.2d 735, ___, No. 86-2002, slip op. at 9-10 (9th Cir. August 10, 1987).

1299 (9th Cir. 1977) (contention that jury instruction improperly called for legal judgment could not be raised on appeal because of appellant's failure to object to instruction on this ground); *see Lifshitz v. Walter Drake & Sons, Inc.*, 806 F.2d 1426, 1430-31 (9th Cir. 1986); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986). We therefore express no opinion as to the propriety of submitting the liability issues to the jury.

C. *County's Motion for Judgment Notwithstanding the Verdict*

[12] The County challenges the sufficiency of the evidence produced to support the jury's liability verdict in favor of the Herringtons. The County argues that the district court incorrectly denied its motion for judgment notwithstanding the verdict ("JNOV"). We conclude that the County is precluded from obtaining a JNOV.

[13] The County moved for a directed verdict at the close of the Herringtons' case, but failed to renew the motion at the close of all the evidence. Under Federal Rule of Civil Procedure 50(b), a motion for a directed verdict *at the close of all the evidence* is a prerequisite for a post-trial motion for JNOV. *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 786 F.2d 1342, 1346 (9th Cir. 1986). The "requirement that the motion be made at the close of all the evidence is to be strictly observed." *Id.* This requirement may be avoided only where: 1) an earlier motion for a directed verdict has been taken under advisement by the trial judge, or 2) an ambiguous or inartful request or motion is made at the close of evidence which sufficiently approximates a motion for a directed verdict. *Id.* at 1346-47. These exceptions do not apply to the instant case. Our decisions subsequent to *Farley* have all followed the strict interpretation of Rule 50(b). *See Johnson v. Armored Transport of California, Inc.*, 813 F.2d 1041, 1042-43 (9th Cir. 1987); *Lifshitz*, 806 F.2d at 1428;

Gilchrist, 803 F.2d at 1493. We decline to depart from this strict interpretation here.

Despite *Farley*, the district court entertained the County's motion for JNOV. The court found that the purpose behind Rule 50(b) was not implicated because there was no indication that the Herringtons had lost an opportunity to submit additional evidence. The court denied the motion on the merits, finding substantial evidence to support the jury verdict. The County argues that, for the reasons stated by the district court, we should consider its JNOV motion. We disagree. In *Farley* we explicitly rejected the reasoning of the district court in the case at hand. We adopted a strict application of Rule 50(b) in order to avoid "engag[ing] in a difficult and subjective case-by-case determination of whether a failure to renew a motion for directed verdict at the close of all the evidence has resulted in . . . prejudice to the opposing party under the particular circumstances of that case." *Farley*, 786 F.2d at 1346. The County is precluded from challenging the sufficiency of the evidence.[11]

D. *Existence of Evidence to Support Jury Verdict*

[14] Because the County is precluded from challenging the sufficiency of the evidence, our "inquiry is limited to whether there was any evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a 'manifest miscarriage of justice.' " *Shipman v. Central Gulf Lines, Inc.*, 709 F.2d 383, 386 (5th Cir. 1983) (quoting *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978)). We review the jury's

---

[11]We may review the sufficiency of evidence despite failure to move for a directed verdict at the close of the evidence where "there is such plain error apparent on the face of the record that failure to review 'would result in a manifest miscarriage of justice.' " *Williams v. Hughes Helicopters, Inc.*, 806 F.2d 1387, 1392 (9th Cir. 1986) (quoting *United States v. 33.5 Acres of Land*, 789 F.2d 1396, 1400 (9th Cir. 1986)). We find no such plain error here.

liability finding to determine "whether there is an 'absolute absence of evidence to support the jury's verdict.' " *Shipman*, 709 F.2d at 385 (quoting *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 298 (5th Cir. 1978)).[12] To uphold the general verdict, we must find that evidence was presented by the Herringtons in support of each and every theory of liability submitted to the jury. *Cf. Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986) (where a general jury verdict is reviewed for sufficiency of the evidence, it ordinarily will be "upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury"), *cert. denied*, 107 S. Ct. 876, 884 (1987).

We have little difficulty in concluding that evidence was presented to support a finding of liability pursuant to the Herringtons' procedural due process claim. The Herringtons provided evidence that they were deprived of notice and an opportunity to be heard in regard to certain key decisions regarding their property. In addition, the Herringtons provided evidence that documents submitted to the County in support of their development application had been tampered with in order to present the proposal in an unfavorable light. Of course, the County's interpretation of these incidents differs from the Herringtons' interpretation. In particular, the County argues that the County cannot be held responsible for the misdeeds of staff employees. However, the County did not request a jury instruction distinguishing the acts of County staff from the acts of County officials. The jury found the County to be responsible for the misdeeds in question. We

---

[12]The County is precluded from challenging the substance of the liability *instructions*, even if "plain error" was present, because it made no objections to these instructions at trial. *Brocklesby v. United States*, 767 F.2d 1288, 1293 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 882 (1986); *Pierce Packing Co. v. John Morrell & Co.*, 633 F.2d 1362, 1365 (9th Cir. 1980); *Calhoun v. United States*, 591 F.2d 1243, 1246 (9th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *Moore v. Teflon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978); *Bock v. United States*, 375 F.2d 479, 480 (9th Cir. 1967). We express no opinion as to the validity of these instructions.

cannot conclude that the Herringtons' evidence provides no support to a verdict of procedural due process violations.

Findings of liability for substantive due process and equal protection violations come somewhat closer to the "plain error" border. In regard to substantive due process, while the Herringtons' development application for a 32-lot subdivision came within the General Plan's quantitative limitation of 35 lots, the General Plan also contained qualitative agricultural and environmental policies which the Herringtons conceded were legitimate. However, especially in light of the testimony regarding the County staff's misrepresentation of evidence, and the open space and resource preservation components of the Herringtons' proposal, we cannot conclude that there is an absolute absence of evidence that the County's inconsistency determination was irrational or arbitrary.

In regard to equal protection, the Herringtons showed that the County had approved sizable residential developments on three other agricultural properties shortly after it had rejected the Herrington proposal. While we are skeptical that there were no meaningful differences between these properties and the Herrington property, the Herringtons did supply evidence that no such differences existed.

In sum, under the extraordinarily deferential standard of review which we must apply to the jury's verdict, we conclude that the jury's liability determination must stand. In accordance with this conclusion, we affirm the district court's injunctive order invalidating the County's preliminary determination that the Herrington proposal was inconsistent with the General Plan.

E. *Trial Judge Bias*

[15] In addition to challenging the jury's liability determination, the County argues that it is entitled to a new trial because the trial judge was biased against it. We disagree.

After the trial of this case, the County discovered that Judge Weigel once owned land in Sonoma County which had been affected by the adoption of the General Plan in January 1978. The County moved to disqualify Judge Weigel. Judge Weigel denied the motion, but recused himself from further proceedings because of his developing animosity toward the County's attorney. After Judge Weigel recused himself, the County submitted a motion to the district court for a new trial on the ground that Judge Weigel was biased against the County, and should have disqualified himself from presiding over the trial. The district court denied this motion. We review Judge Weigel's failure to disqualify himself prior to trial for abuse of discretion. *See United States v. Burt*, 765 F.2d 1364, 1368 (9th Cir. 1985).

Under 28 U.S.C. § 455, a judge must disqualify himself, inter alia: 1) "in any proceeding in which his impartiality might reasonably be questioned," *id.* § 455(a); 2) "[w]here he has a personal bias or prejudice concerning a party," *id.* § 455(b)(1); or 3) where "[h]e knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding," *id.* § 455(b)(4).[13]

Bias under 28 U.S.C. § 455 must derive from extrajudicial sources. *In re Beverly Hills Bancorp* (*Commercial Paper Holders v. R.W. Hine*), 752 F.2d 1334, 1341 (9th Cir. 1984). Section 455(a) covers circumstances that *appear* to create a conflict of interest, whether or not there is actual bias. *Davis v. Xerox*, 811 F.2d 1293, 1295 (9th Cir. 1987). Section 455(b) covers situations in which an *actual* conflict of interest exists,

---

[13]Recusal is required under 28 U.S.C. § 144 whenever a judge has a "personal bias or prejudice" concerning a party. We apply the same test for bias under both 28 U.S.C. 455 and 28 U.S.C. § 144. *In re Beverly Hills Bancorp* (*Commercial Paper Holders v. R.W. Hine*), 752 F.2d 1334, 1341 (9th Cir. 1984).

even if there is no appearance of one. *Id.* Section 455(b) also describes situations that create an *apparent* conflict, because it provides examples of situations in which a judge's "impartiality might reasonably be questioned" pursuant to section 455(a). *See United States v. Conforte*, 624 F.2d 869, 880-81 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

Actual bias is a per se ground for disqualification. *Davis*, 811 F.2d at 1295. We have defined bias to consist of "an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes." *Conforte*, 624 F.2d at 881. The test for creation of *apparent* bias sufficient to require dismissal under sections 455(a) and 455(b) is an objective one: "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983).[14]

The County's charge of bias stems from Judge Weigel's ownership of two tracts of land in Sonoma County. The judge purchased an 80-acre property in Alexander Valley in 1961. He purchased a 52-acre property in Bennett Valley in 1963. Both properties were sold in 1978. According to the County, Judge Weigel's ownership of this property caused bias in two respects: 1) the similar experiences of Judge Weigel and the Herringtons under the Sonoma County General Plan caused Judge Weigel to commiserate with the Herringtons during the course of the trial, and 2) Judge Weigel had a financial interest in the outcome of the trial because he holds a promissory note secured by the Bennett property.

At the outset, we find that, contrary to the County's allega-

---

[14]We note it has been held that, after a trial is over, a party is not entitled to a new trial where only the *appearance* of bias exists. *United States v. Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985). We need not reach this issue because we find no appearance of bias in this case.

tion, the trial record itself does not indicate bias against the County. Judge Weigel was an active participant in the trial, but his participation was fair to both sides. The judge certainly exhibited animosity toward the County attorney during the hearing on the disqualification motion. However, personal bias, to require disqualification, must be against the party, not against counsel for the party. *Cintron v. Union Pacific Railroad Co.*, 813 F.2d 917, 921 (9th Cir. 1987). Moreover, Judge Weigel recused himself from further proceedings because of his developing animosity toward the County attorney. Because the courtroom proceedings in this case provide scant evidence of extrajudicial bias, we focus our analysis on whether the Judge Weigel's former ownership of land in Sonoma County created actual or apparent bias against the County.

The County's first argument is that the similarity between Judge Weigel's experiences with County land use regulation and the Herringtons' experiences indicates that Judge Weigel was biased against the County. The County alleges that this bias was evidenced by the judge's unfavorable treatment of the County throughout the trial.

Both of Judge Weigel's parcels were affected by the adoption of the County General Plan in 1978. In particular, the number of maximum allowable units on the two properties was radically reduced. The value of the properties was significantly reduced as a result. Judge Weigel hired an attorney in 1978 to investigate his property rights under the General Plan, but the judge never filed a development application. The Alexander property was apparently sold in 1978, after it had been downzoned. Judge Weigel also sold the Bennett property in 1978, and retained a security interest in it to secure a promissory note. The note, not in default, is apparently greatly oversecured.

[16] We conclude that the restrictions placed by the County on the land formerly owned by Judge Weigel created neither

actual nor apparent bias on the part of the judge. This case was tried in 1985—seven years after the judge sold his Sonoma County properties. Judge Weigel was never involved in adversary proceedings against the County. Judge Weigel had no experience with the procedures at issue in this case because he never filed a development application. He was simply one of many landowners whose property interests were affected by the adoption of the 1978 General Plan. Judge Weigel's experiences were not sufficiently similar to those of the Herringtons to indicate actual or apparent bias.[15]

The County's second argument is that Judge Weigel had a financial interest in the outcome of the suit. His alleged interest is his promissory note secured by the Bennett Valley property. The County charges that the outcome of this litigation could affect the value of the property securing the note.

Under 28 U.S.C. § 455(b)(4), a judge must disqualify himself where "[h]e knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding . . . ." The statute defines "financial interest" as "ownership of a legal or equitable interest, however small . . . ." *Id.* § 455(d)(4). It is undisputed that even the slightest financial interest in the outcome of litigation requires disqualification. *New York City Housing Development Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986); *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714 (7th Cir. 1986); *In re City of Houston*, 745 F.2d 925, 928 (5th Cir.

---

[15]The County has brought to our attention a newspaper editorial from the "Santa Rosa Press-Democrat" dated January 2, 1986. The editorial states, inter alia: "If the county's representations about the judge's property holdings are correct, Judge Weigel should have disqualified himself, or at the least, disclosed his holdings before the trial began and given Sonoma County officials the opportunity to decide whether a motion for disqualification was necessary." Although the editorial is not irrelevant, the "mere sound of controversy" does not automatically create an appearance of judicial bias. *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981).

1984); *In re Cement Antitrust Litigation*, 688 F.2d 1297, 1308 (9th Cir. 1982), *aff'd mem.*, 459 U.S. 1191 (1983).

[17] We conclude that Judge Weigel had no financial interest in the outcome of the Herrington lawsuit. Judge Weigel sold his property in Sonoma County long before the trial commenced. He does retain a security interest in the Bennett property, and the Bennett property is governed by the General Plan. But the Herringtons have not sought invalidation of the General Plan; they have sought only invalidation of the County's application of the General Plan to their property. Thus, the judgment of the jury will have no direct effect on the value of the Bennett property. At most, the judgment might affect the Bennett property by making the County more cautious about placing restrictions on land use. However, even if the judgment in this case could have such an indirect effect on the value of the Bennett Valley property, the value of Judge Weigel's promissory note, which is greatly oversecured, would not be affected. Judge Weigel's "connection" to the Herringtons' lawsuit due to his security interest in the Bennett Valley property is too remote, contingent, and speculative to constitute a financial interest in the case. *See In re Placid Oil Co.*, 802 F.2d 783, 786-87 (5th Cir. 1986). Nor did this remote relationship create an appearance of bias. *See id* at 787.

We conclude that the County has not demonstrated that Judge Weigel should have disqualified himself prior to trial. We therefore affirm the district court's denial of the County's motion for a new trial on the ground of judicial bias.

F. *The Damages Award*

The County argues that the jury's damages award is excessive and cumulative. It contends that, even if we uphold the jury's liability verdict, we should remand for a new trial on the issue of damages. The County did not object to the jury instructions on damages. Nevertheless, we conclude that the

$2,500,600 damages award is so grossly excessive that it shocks the conscience. *See Gilchrist,* 803 F.2d at 1501; *Hollins v. Powell,* 773 F.2d 191, 197 (8th Cir. 1985), *cert. denied,* 106 S. Ct. 1635 (1986). We therefore vacate the award and remand the damages issue for a new trial.

[18] The $2.5 million damages award is grossly excessive because it is well in excess of the value of the property, even with a development potential of approximately 32 units. Expert witness Charles Semple testified that the Herrington parcel was worth $1.3 million with a 32-lot development potential.[16] David Herrington valued the property at $1.5 million with such a potential. The $2.5 million award is excessive in light of these valuations because the Herringtons have not lost their property. Nor have the County's unlawful acts permanently deprived the Herringtons of any development potential to which the Herringtons were entitled: the County's inconsistency determination has been invalidated.[17] We cannot allow the Herringtons to keep their property *and* be compensated in an amount almost double the sale value of the property.

---

[16]In calculating the losses suffered by the Herringtons, the expert purportedly did not rely directly on the value of a 32-unit development. However, it is apparent from the expert's testimony that he had this figure in mind when he made his calculations. In addition, the $1.3 million figure is roughly in accord with David Herrington's testimony that the property was worth $1.5 million with a 32-lot development potential.

[17]We also note that $2.5 million greatly exceeds the money damages requested by the Herringtons at trial. At trial, counsel for the Herringtons stated that $2.5 million was the "maximum claim . . . if no other relief were available . . . ." The context of this statement indicates that by "no other relief available," counsel meant no injunctive relief. The Herringtons obtained injunctive relief in the form of invalidation of the County's inconsistency determination. Moreover, at the closing argument, the Herringtons, in addition to requesting invalidation of the County's inconsistency determination, asked for a verdict "somewhere between a million five and a million seven . . . to make the Herringtons whole."

The Herringtons argue that the jury's award was reasonable. In support of this contention, the Herringtons state that the economic damage caused by the County's unlawful acts had three components: 1) permanent and irretrievable loss of value in the sum of $810,000; 2) lost potential profit in the sum of $910,000; and 3) loss of return on the lost value (calculated at the prevailing market rate of interest) in the sum of $800,000.[18] The total of these three components is $2,520,000. The components of damage alleged by the Herringtons do not alter our conviction that the damages award is grossly excessive. It is clear that these components are excessive or cumulative in at least three respects: 1) the valuation of each component is speculatively based on the assumption that the County could not legally have foreclosed development of approximately 32 units and on the assumption that the only alternative to the Herringtons' 32-lot proposal was no development at all; 2) because the Herringtons retain ownership of their land and because they have obtained invalidation of the inconsistency determination, the damage suffered is largely temporary rather than permanent; and 3) the awards for lost value and lost profits are duplicative.

1. *Speculativeness of the Award*

The Herringtons claim damages for permanent lost value in the amount of $810,000. This loss allegedly occurred in December 1979 when the Board of Supervisors made its inconsistency determination. The $810,000 figure is derived from expert testimony that the Herrington property is worth $1.3 million with the potential to construct a subdivision of approximately 32 units, and $490,000 with no development rights at all. The difference between $1.3 million and

[18]Although the Herringtons' brief does not make it clear, it appears from the expert testimony of Charles Semple that this lost return component is based *solely* on lost value, and not on lost profit. The lost profit component itself apparently includes loss of return on the profit.

$490,000 is $810,000. We conclude that $810,000 is an excessive award for lost value because the $1.3 million dollar figure is too high and the $490,000 figure is too low.

The $1.3 million figure is too high because the Herringtons never had the "right" to construct a 32-unit subdivision. The Herringtons' apparent contention that the 32-lot proposal would eventually have been approved had it been found consistent with the General Plan is entirely speculative. A consistency determination is a preliminary determination which merely gives a developer the "green light" to proceed with its development application. As former County Subdivision Planner Michael Morrison testified, a finding that a proposed subdivision is consistent with the County's General Plan is no guarantee that a development proposal will ultimately be approved. The developer must still comply with, inter alia, the detailed requirements of Cal. Gov't Code §§ 66410 et seq. (West 1983).[19] The County is not, and never has been, precluded from rejecting the Herringtons' 32-lot proposal, as long as that rejection is not irrational or arbitrary. The Herringtons obtained a verdict only that the County's inconsistency determination was unlawful, not that destruction of a 32-lot development potential would have been unlawful. The County cannot be required to compensate the Herringtons for the latter.

Moreover, the $490,000 estimate for the value of the property after the County made its inconsistency determination is too low. This estimate assumes that the County's rejection of the Herringtons' 32-lot subdivision unlawfully destroyed all hope for profitable use of the Herrington parcel. However, the Herringtons abandoned their taking claim, and cannot now argue that the County denied them all economically viable

---

[19]For example, in addition to requiring a county to reject a development proposal which is inconsistent with the general plan, Cal. Gov't Code § 66474 (West 1983) lists six other circumstances which require a county to deny approval of a tentative subdivision map.

use of their land.[20] In sum, because the $1.3 million valuation is too high, and the $490,000 valuation too low, the $810,000 lost value component based on the difference of those two figures is excessive.

The $800,000 component for loss of return is based on investment of the alleged $810,000 lost value at a market rate, beginning in December 1979. Because the lost return component consists of interest on an exaggerated lost value component, it too is excessive.

The lost profit component is excessive for the same reason that the lost value component is excessive. The profit component is based on the assumption that the Herringtons were entitled to approval of a development of approximately 32 units and on the assumption that the only alternative to the 32-lot proposal was no development at all. As we explained above, both of these assumptions are wholly speculative.[21]

2. *Temporary rather than Permanent Harm*

Because the Herringtons retain ownership of their land, and because the inconsistency determination has been declared invalid, at least part of the lost value component is

---

[20]See our discussion of ripeness, *supra*.

[21]We express no opinion about the appropriateness of awarding *any* lost profits to the Herringtons. We note, however, that in taking cases, damages for lost profits are generally considered excessively speculative. *See, e.g., A.G. Davis Ice Co. v. United States*, 362 F.2d 934, 936-37 (1st Cir. 1966); *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709, 729 (D.N.J. 1976); *Hedstrom Lumber Co. v. United States*, 7 Cl. Ct. 16, 27-29 (1984); *Foster v. United States*, 2 Cl. Ct. 426, 445-46 (1983); *Kearney Trecker Corp. v. United States*, 688 F.2d 780, 783-84 (Cl. Ct. 1982). *But cf. Scott v. Greenville County*, 716 F.2d 1409, 1424 (4th Cir. 1983) (claim for lost profits due to alleged substantive due process violation survived motion for summary judgment). Suffice it to say that the Herringtons' allegation of lost profits does not affect our conviction that the jury award was grossly excessive.

entirely superfluous. Even if we assume that the County unlawfully caused a decrease in the value of the Herrington property in the amount of $810,000, the loss was temporary, not permanent.[22] Because the Herringtons retain their property, they have, at best, suffered *delay* in receiving the $810,000. That delay is fully compensated by awarding interest (i.e., loss of return) for delay in receipt of the lost value. We acknowledge that expert witness Charles Semple testified that a portion of the lost value (perhaps half) was irretrievable because, inter alia, the costs for developing streets and utilities have risen since 1980. At this stage, we do not preclude the Herringtons from claiming damages for this form of irretrievable lost value.

As with the lost value figure, the lost profit figure does not adequately take into account that the Herringtons' alleged potential profit has been delayed, not permanently lost. Even if we assume that the $910,000 lost profit component is accurate, the expert testimony indicates that at least one fourth of that amount could be recaptured if construction of residential development began now.

3. *Cumulativeness of the Award*

Finally, we agree with the County that the damages award is cumulative. The $810,000 loss of value component compensates the Herringtons for loss of the alleged development potential of their property. In other words, had the Herringtons established a right to a development potential of approximately 32 lots, the County would have had to pay $810,000 to take that development potential from them and preclude them from making any economically viable use of their property. The $915,000 lost profit component constitutes a double

---

[22]In characterizing the Herringtons' lost value as temporary rather than permanent, we are assuming that, in accordance with the expert testimony, the relevant land values have not changed significantly since the County made its inconsistency determination.

recovery for the loss of the alleged development potential because the valuation of this potential is based in part on expected profit, which is foregone by the seller upon sale of the development right. Had the Herringtons sold the right to develop the property, they would not have actually received profits from the development. Therefore, the Herringtons cannot obtain compensation for both lost value and lost profit. Nor can they obtain compensation for loss of return on both delayed sale value and delayed profit.

4. *Conclusion*

In conclusion, because the Herringtons retain their property, and have obtained a judgment invalidating the County's inconsistency determination, the harm caused by the County's unconstitutional acts derives primarily from delay in the proper consideration of the Herringtons' subdivision application.[23] We express no opinion as to whether *any* of the

---

[23]The only injury has been to delay the utilization by Herrington of the property in its highest and best permissible use.

On the present record we know neither the proper length of that delay nor the "highest and best permissible use." The two unknowns are related; only by ascertaining the latter can the former be approximated. Moreover, it is possible that some of the actual delay in development is due to the failure of Herrington to mitigate damages. These deficiencies in the record are enough to justify the rejection of the $2,500,600.00 award. However, they also suggest that the trial court may well be at sea in its attempt to fix damages. How is it to determine what is the property's "best permissible use" and at what point in time that utilization will, or would have, become possible? It is likely the district court will seek out a surrogate measure of damages.

One such measure would be the difference between the value of the property immediately before the County's inconsistency determination and its value immediately after that determination. A fully informed buyer after the County's inconsistency determination, in fixing the price he would be prepared to bid, would attempt to estimate what level of development he was likely to be permitted by the County. Of course, such a buyer would like to purchase the property on the assumption that no development would be

three components of damage asserted by the Herringtons are appropriate in this case. We only hold that, for the reasons stated above, these components are excessive and cumulative. We cannot allow the $2.5 million jury award to stand. We therefore vacate the damages award, and remand the case for a new trial on damages.

G. *Prejudgment Interest*

The Herringtons argue that the district court erred in denying prejudgment interest on the jury award from the date of verdict to the date of entry of judgment. We need not reach this issue because of our decision to vacate the jury's award of damages.

CONCLUSION

The Herringtons' procedural due process, substantive due process, and equal protection claims are ripe. The County's failure to object to the jury instructions below precludes it from appealing the submission of the issue of the County's liability to the jury, and from objecting to the substance of

---

permitted. The owner very likely would be unwilling to sell at such a figure, which in this case appears to be $490,000.00.

On the other hand, a buyer immediately before the inconsistency determination is not likely to pay a price measured by assuming approximately 32 units would be authorized. He would know there is a risk that many fewer units would be authorized and his bid price would be lowered to account for this possibility. Thus, such a buyer would not be likely to pay $1.3 million.

This suggests that should this surrogate measure be employed recoverable damages should be somewhat less than $810,000.00. The possible availability of prejudgment interest presents an issue the trial court should explore. The present record discourages any effort to express an opinion on that issue at this time.

No doubt other approaches to the measurement of damages will emerge in the hearings on remand.

those instructions. The County is also precluded from challenging the sufficiency of the Herringtons' evidence through a motion for judgment notwithstanding the verdict. We find that there was not an absolute absence of evidence to support the jury's findings of liability in regard to the Herringtons' due process and equal protection claims. Thus, we AFFIRM the district court's injunctive order invalidating the County's inconsistency determination. But the jury's award of damages is so grossly excessive as to shock the conscience. We therefore VACATE that portion of the judgment awarding damages and REMAND the case to the district court for a new trial on damages.

The Herringtons' request for attorney's fees on this appeal pursuant to 42 U.S.C. § 1988 is denied.

TANG, Circuit Judge, dissenting:

I respectfully dissent. While I agree at a minimum with the decision to remand the case for a new trial on damages because excessive, I think it more logical to hold that the Herringtons' claims are simply not ripe for review and should have been dismissed by the district court. The Herringtons assert violations of their rights to procedural and substantive due process and to equal protection. As the majority points out, the only injury derives from delay in consideration of the Herringtons' subdivision application. Slip op. at 41. The majority's opinion highlights the difficulty of assessing the damages caused by such a due process violation when it says "we know neither the proper length of that delay nor the 'highest and best permissible use.'" *Id.* at n.23. The suggestion of the necessity for a surrogate measure to calculate unknown damages indicates to me that in reality a case in this posture is not ripe for review.

The majority holds that the Herringtons met the "final decision" ripeness requirement enunciated in *Kinzli v. City of*

Santa Cruz, 818 F.2d 1449 (9th Cir. 1987), a regulatory taking case. The fact that application of the *Kinzli* factors to this case leads to a finding that the factors are satisfied suggests that *Kinzli* offers an inadequate measure of ripeness in a case involving only claims of due process and equal protection violations. I agree that the Herringtons' proposed subdivision was rejected and that it would have been futile for them to seek a variance, but I do not think this satisfies the essence of the "final decision" requirement for ripeness.

In taking and due process cases, the ripeness requirement is intended to assure that courts can make an accurate determination of the precise economic impact of zoning regulations. That determination cannot be made until "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985). The Herringtons' claims are not based on a denial of all use, but on an arbitrary and discriminatory denial of the use they proposed. The County's rejection of their development plan may have been a final decision about the proposed subdivision, but it was not a final, definitive statement of how the County would apply the general plan to the Herringtons' land.

The difficulty with treating such claims as ripe for review before the County has finally determined the use it will allow is that damages are not calculable. An excessive jury verdict in such a case is hardly surprising. Any verdict based upon sheer speculation about the amount of damages is prone to be excessive because it is not constrained by any appropriate measure of actual damages. The solution suggested by the majority that on remand a surrogate measure of damages may be employed is a possible solution to the difficulties posed by this case. A better solution would have been to avoid the problem by dismissing the case as not yet ripe for review.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN S. HERRINGTON, DAVID S. HERRINGTON and QUAIL HILL RANCH, a partnership,
Plaintiffs/Appellees Cross-Appellants,

v.

COUNTY OF SONOMA,
Defendant/Appellant/ Cross-Appellee.

Nos. 86-2620; 86-2728

D.C. No. C80-2227 CAL

ORDER AMENDING AMENDED OPINION, DENYING PETITION FOR REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC

Filed September 13, 1988

Before: Herbert Y. C. Choy, Joseph T. Sneed and Thomas Tang, Circuit Judges.

ORDER

A majority of the panel which heard this case has voted to deny the petition for rehearing and the full panel has rejected the suggestion for rehearing en banc. However, the Opinion filed on December 24, 1987 as amended on February 10, 1988, is further amended as follows:

At 834 F.2d 1488, 1494-1498, Section "A. Ripeness" is replaced by the following:

A. *Ripeness*

The County contends that the Herringtons' claims are not ripe for adjudication. We note that the trial judge submitted the ripeness issue to the jury and that the jury implicitly found that the Herringtons' claims were ripe. However, the district court erred in submitting this issue to the jury; ripeness is a question of law which must be determined by the court. *See Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453 n.4 (9th Cir. 1987). We review the ripeness issue de novo. *Id.*

In the area of land use, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. A constitutional challenge to land use regulations is ripe when the developer has received the planning commission's " 'final definitive position regarding how it will apply the regulations at issue to the particular land in question.' " *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2568 (1986)(quoting *Williamson Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985). In *Kinzli*, we interpreted *Williamson* and *MacDonald* to require a final decision by the government which inflicts a concrete harm upon the plaintiff landowner. *Kinzli*, 818 F.2d at 1454. Our decisions in this area have also clarified that we will apply the same ripeness standards to equal protection and substantive due process claims.[1] *See Kinzli*, 818 F.2d at 1455-56; *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). A final decision requires at least: "(1) a rejected development plan, and (2) a denial of a variance." *Kinzli*, 818 F.2d at 1454 (citing *Williamson*, 473 U.S. at 187-90). A landowner may avoid the final decision requirement if attempts to comply with that requirement would be futile. *Id.* A property owner cannot rely on the futility exception until he or she makes at least one meaningful application. *Id.* at 1454-55.

---

[1]Further, we see no reason, under the circumstances of this case, to apply a different standard to Herrington's procedural due process claim, which, like its equal protection and substantive due process claims, relates to the *process* by which the County reached its conclusion.

There is some controversy as to whether the Herringtons submitted even one development application to the County, and as to whether their proposed 32-lot subdivision was conclusively rejected. The County contends that the Herringtons' subdivision application was not complete because it did not contain an Environmental Impact Report ("EIR"). Instead of submitting an EIR, plaintiffs submitted a series of environmental studies. However, it is apparent from testimony by the County staff that submission of an EIR would have made no difference in the County's inconsistency determination. The County also characterizes the Board's inconsistency determination as a "preliminary" rather than a final decision. Nevertheless, it is clear that the 32-lot proposal was conclusively rejected when the inconsistency determination was made by the Board of Supervisors. Former County Planner Toby Ross testified that the Board's inconsistency determination constituted a final decision with respect to the Herringtons' proposed subdivision. He further testified that the only way for the Herringtons to obtain approval for their project, other than going to court, was to seek a General Plan amendment. The Herringtons, Ross stated, would have had no chance of obtaining a General Plan amendment. Michael Morrison, who was the County Subdivision Planner at the time of the Herringtons' application, gave similar testimony. Morrison stated that the Herringtons' only recourse after the inconsistency determination was to seek a General Plan amendment. He did not consider this to be a practical alternative.

This testimony demonstrates that the first *Kinzli* requirement—a rejected development plan—has been satisfied by the Herringtons. Although we do not believe that the Herringtons' development application was formally complete, we agree with the Herringtons' contention that the 32-lot development, as it was originally proposed, was definitively rejected by the County. Once the inconsistency determination was made, it would have been futile for the Herringtons to pursue their application for the 32-lot devel-

opment. The fact that the Herringtons abandoned their application at a "preliminary" stage (i.e., after the inconsistency determination) does not affect our conclusion that a rejected development plan has been obtained in this case. The purpose of the Sonoma County consistency determination process is to enable a developer to determine at a preliminary stage whether to proceed with a particular development application. The County's determination of inconsistency effectively told the Herringtons to stop the application process in regard to the 32-lot proposal. Under the circumstances of this case it would be inappropriate to require the Herringtons to have formally completed a hopeless application.

The Herringtons did not apply for a variance. Nevertheless, the second *Kinzli* factor—application for a variance—need not be met in this case because pursuit of a variance was not a legally viable option. Five months after rejecting the 32-unit subdivision proposal, the Board adopted the Specific Plan, which rezoned the Herrington's property to agricultural use. This designation only allowed residential development with a minimum lot size of 100 acres. The testimony of two County planning witnesses indicated that the *only* means of obtaining approval of the 32-lot proposal was through a General Plan amendment. This testimony finds support in Cal. Gov't Code § 65906, which prohibits the granting of a variance for a use not expressly authorized by the zoning regulation that governs the land in question. Residential development in lots under 100 acres is not an agricultural use, and thus could not be authorized by variance under section 65906. Indeed, the County has at no time asserted that application for a variance was a viable option.[2]

---

[2]We have previously stated that a plaintiff must submit at least one meaningful application for a variance before arguing that subsequent applications would be "futile." *See Lake Nacimiento Ranch v. County of San Luis Obispo*, 830 F.2d 977, 980-81 (9th Cir. 1987); *Kinzli*, 818 F.2d at 1455 n.6. However, the concept of "futility" as developed in those cases refers to situations in which the facts of the case indicate that a variance would not be granted. By contrast, we see no reason to require the pursuit of relief that cannot be granted.

In sum, we hold that the Herringtons have satisfied the *Kinzli* "final decision" ripeness requirement. The County conclusively rejected the Herringtons' 32-lot development proposal and then proceeded to drastically limit the allowable development. Efforts to complete the development application, and application for a variance, would have been futile. In so holding, we emphasize that mere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility. *See Williamson,* 473 U.S. at 188; *Kaiser Development Co. v. City and County of Honolulu,* 649 F. Supp. 926, 942 (D. Haw. 1986). Our holding is based upon repeated and uncontradicted testimony by County officials that the Herringtons' 32-lot proposal could not have obtained approval. The finality of this determination allows evaluation of the Herrington's challenge to the County's decisionmaking process.

Our conclusion that further attempts to obtain acceptance of the development proposal would have been futile precludes the County's suggestion that the Herringtons must nonetheless reapply to determine the exact permitted level of development. In *MacDonald,* which involved a regulatory taking claim, the Court required reapplication to meet the finality requirement. *See* 106 S. Ct. at 2566. However, a taking claim requires proof that substantially all economically viable use of the property has been denied. *See First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S. Ct. 2378, 2388 (1987); *MacDonald,* 106 S. Ct. at 2568-69. Thus, "a prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald,* 106 S. Ct. at 2568-69; *see Kinzli,* 818 F.2d at 1453.

We can fully review the adequacy of notice prior to decision (the procedural due process claim), the rationality of the inconsistency determination (the substantive due process claim), and the alleged dissimilar treatment accorded simi-

larly situated landowners (the equal protection claim) from the point at which further pursuit of the rejected proposal is deemed futile. For purposes of evaluating the County's decisionmaking process in rejecting the proposal, the Herringtons have received a " 'final definitive [decision] regarding how [the County Board] will apply the regulations at issue to the particular land in question.' " *MacDonald*, 106 S. Ct. at 2568 (quoting *Williamson*, 473 U.S. at 191). That is, their proposal has been definitively rejected.

Also, the last sentence of the amended majority opinion is further amended to read as follows:

The Herrington's request for attorneys' fees on this appeal will be considered upon submission of proper documentation.

The full court has been advised of the suggestion for rehearing en banc and the amendments to the Amended Opinion. No judge of the court has objected to the amendments or requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(B).

With the Opinion so amended the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.